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Wisconsin, Supreme Court

WISCONSIN REPORTS of

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CASES DETERMINED

IN THE

SUPREME COURT

OF

WISCONSIN

NOVEMBER 16, 1920—APRIL 5, 1921

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JUSTICES

OF THE

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MEMORANDA.

Mr. Justice KERWIN took no part in the decision of the cases reported in this volume except those appearing on pages 29–32, 137–140, 184–190, 447–460.

Mr. Justice ESCHWEILER took no part in the decision of the cases reported in this volume on pages 1–19, 29–37, 53–56, 65–83, 128–168, 400–460, 509–512, 559–560, 596–599.

ERRATUM.

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Page 67, line 7 from bottom. For *Reversed,* read *Affirmed.*

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CASES DETERMINED

AT THE

August Term, 1920.

VAN CAMP, Respondent, vs. PATRICK, Appellant.

October 22—November 16, 1920.

Specific performance: Contract to convey land: Death of vendor: Deed from heir: Form.

Under sec. 3501, Stats., empowering the court, in an action for the specific performance of a written contract to convey land made by a person since deceased, to require the executor or administrator "to convey the estate" in like manner as decedent ought if living, or in certain circumstances to require the heirs instead of the executor or administrator "to convey the estate," or to join the executor or administrator in the conveyance, or itself by its judgment to pass the title to the land, it is not intended that a deed with usual covenants of warranty be required of an heir.

APPEAL from a judgment of the circuit court for Marinette county: W. B. QUINLAN, Circuit Judge. *Reversed.*

Action to enforce specific performance of a land contract. Lewis S. Patrick, in his lifetime, executed to plaintiff a certain land contract by which he agreed to convey to her, upon payment of the sums of money therein mentioned, the real estate therein described by "a good and sufficient deed, in fee simple, free and clear of all legal liens and incumbrances, except the taxes herein agreed to be paid by the party of the second part." Before all the instalments of the purchase money were paid, Patrick died, leaving his widow, *Sarah W. Patrick,* the defendant, his sole heir at law, to whom the payments of the purchase money were made after Patrick's death. Upon the completion of the payments of

the purchase money the defendant executed and tendered to the plaintiff a deed of the premises, containing the covenant "that the said premises are free and clear of all legal liens and incumbrances except the taxes, special or general, which have been assessed on said premises since the 1st day of January, 1911, and also all such as may have been or be thereafter assessed thereon." The taxes referred to were assumed by plaintiff by the terms and conditions of the land contract. There were no other covenants in the deed tendered which are usually found in an ordinary warranty deed. The plaintiff refused to accept the deed tendered, claiming that she was entitled to a deed containing full covenants of warranty, and brought this action to compel the execution on the part of the defendant of such a deed.

The case was tried by the court. Findings of fact and conclusions of law were filed by which it was found that the plaintiff is entitled to a deed containing the usual and proper covenants, which are (1) that the grantor is lawfully seised; (2) that he has good right to convey; (3) that the land is free from incumbrances; (4) that the grantee shall quietly enjoy; and (5) that the grantor will warrant and defend the title against all lawful claims. From a judgment rendered in favor of the plaintiff upon such findings the defendant appealed.

The cause was submitted for the appellant on the brief of *Eastman & Goldman,* attorneys, and *Henry T. Scudder,* of counsel, all of Marinette, and for the respondent on that of *G. B. Evans* of Marinette.

OWEN, J. There is much discussion in the briefs as to whether the clause in the contract by which Patrick agreed to convey the premises to the plaintiff by a "good and sufficient deed, in fee simple, free and clear of all liens and incumbrances," etc., entitles the plaintiff to a deed containing the usual covenants of warranty, as found by the court. It is not necessary for us to determine whether Patrick, if liv-

ing, could be compelled to execute a deed containing the covenants required by the judgment in this case. This is not an action against Patrick. It is an action against his widow and sole heir at law. It is brought under sec. 3501, Stats., which provides:

"Whenever any person who is bound by a contract in writing to convey any real estate or interest therein shall die before making the conveyance the person entitled thereto, or if he be dead then any person who would have been entitled to the estate under him as heir, devisee or otherwise, in case the conveyance had been made according to the terms of the contract, or the executor or administrator of such deceased person, for the benefit of the person so entitled, may maintain an action in the circuit court to enforce a specific performance of the contract by the heirs, devisees or the executor or administrator of such deceased person who made the contract. If in such action it shall appear that the plaintiff is entitled to have a conveyance of such real estate the court may require such executor or administrator to convey the estate in like manner as the deceased person might or ought to have done if living; and if the heirs or devisees of such deceased person or any of them shall be within the state and made parties to such action the court may require them, instead of the executor or administrator, to convey the estate or may require them to join with the executor or administrator in such conveyance; or the court may, by its judgment, pass the title to such real estate to the plaintiff without any conveyance; and every conveyance or judgment so made shall be effectual to pass the estate contracted for as fully as if the contracting party were still living and then executed the conveyance."

This section gives the court power to "require such executor or administrator *to convey the estate* in like manner as the deceased might or ought to have done if living," and under certain circumstances to require the heirs, "instead of the executor or administrator, *to convey the estate,*" or to "join with the executor or administrator *in such conveyance,*" or "the court may, by its judgment, pass the title to such real estate to the plaintiff without any conveyance."

Manifestly the purpose of this statute was to bring about the *conveyance of the estate.* Such conveyance "shall be effectual to pass the estate contracted for as fully as if the contracting party were still living and then executed the conveyance." There is nothing in the statute to indicate a legislative intent that any one, whether it be the administrator, executor, or heirs, should assume the personal responsibility arising from the covenants required by the judgment of the court, and certainly a conveyance by the court carries with it no such covenants. It is plain that the law could not compel the assumption of such obligations by any one. Certainly the executor or administrator could not be compelled to assume such a personal obligation, and we know no theory of law by which a man can cast upon his heirs or devisees obligations to perform his covenants to their detriment. They cannot be compelled to pay his debts out of their own property.

In this case the widow received but a small portion of the purchase price. In case of a breach of any of the covenants which the court required to be inserted in the deed, the damages might be many times greater than the amount she received as a part of the purchase price and greater than the amount she received from the entire estate. If she signed a deed containing the covenants required by the judgment of the court, she would thereby pledge her personal estate to the discharge of her husband's obligations. This the law cannot compel. It amounts to the taking of property without due process of law. The statute does not attempt to do it. It merely affords a method by which the estate of the deceased may be transferred to the purchaser. Whether the deed be executed by the administrator, the executor, the heir, or the estate transferred by the court, the effect is "to pass the estate contracted for as fully as if the contracting party were still living and then executed the conveyance." If the deceased had a perfect title, that title is conveyed. If he did not have a perfect or marketable title, the purchaser is

not obliged to accept the conveyance, and he has the same remedies against his estate for breach of the contract as would be available against him if he were living.

The court was in error in rendering judgment requiring the defendant to execute a deed containing the covenants therein required. The deed tendered by her fully discharged her obligations in the premises. The complaint of the plaintiff should have been dismissed.

By the Court.—Judgment reversed, and cause remanded with instructions to dismiss the plaintiff's complaint.

FINNEGAN, Appellant, vs. EAGLE PRINTING COMPANY, Respondent.

October 22—November 16, 1920.

Libel: Derogatory matter: Defenses: Repeating statements of third persons: Reports of judicial proceedings: Publication of pleadings and preliminary papers: Privilege: Comment on acts of public officers: Demurrer: Good in part: Effect.

1. Publication of language which tends to injure one in his reputation and to degrade and disgrace him in society is libelous.
2. In an action for libel against a newspaper it is no defense that the newspaper only published statements communicated to it by a third person.
3. Great freedom is allowed to parties in stating in their pleadings the facts relied on to establish their rights; but the publication of pleadings or other preliminary papers to which the attention of no judicial officer has been called and no judicial attention invited, is not privileged.
4. Publications containing insulting, contemptuous phrases or false and libelous statements of fact are not privileged, even though they concern the acts of public officers.
5. The defense of privilege or fair criticism and proper comment is not available in an action for libel brought by the plaintiff, who is a private citizen and not a public officer or a candidate for office, and is not a member of any class seeking and inviting public patronage.
6. In a libel action, where a third defense setting up privilege referred to the second defense setting up justification and

made such second defense a part of the third defense, a demurrer to the latter on the ground that the facts alleged did not show privilege cannot be sustained, since the court cannot disregard the incorporation of the second defense into the third nor treat it on demurrer as mere surplusage.

APPEAL from an order of the circuit court for Marinette county: W. B. QUINLAN, Circuit Judge. *Affirmed.*

This is an appeal from part of an order which overrules plaintiff's demurrer to the third defense in the answer setting up privilege.

After formal allegations the complaint alleged that the deputy sheriff of Marinette county and E. B. Martineau, one of the attorneys for the plaintiffs in certain suits which had been brought by them, came to plaintiff's home and stated that they intended to seize certain furs, but served no process; that the furs were the property of the plaintiff's wife and they so informed the deputy and Mr. Martineau; that the plaintiff, by telephone, advised with an attorney, who advised him and Martineau that the furs could not be legally seized upon an attachment against the plaintiff; that on March 29, 1917, said Martineau and deputy returned with other deputies and carried away the property on writs of attachment; that on that day the defendant newspaper published concerning the plaintiff the following false and defamatory matter:

"Furs are held at county jail. Secured on attachment against P. T. Finnegan of Middle Inlet—Many deputies needed.

"Seventy-five furs, variously estimated to be worth from $1,000 to $1,300, are being held at the Marinette county jail on attachment proceedings against *P. T. Finnegan,* a logger of Middle Inlet. The attachment was secured through attorneys Martineau, Evert & Martineau for four different parties.

"Attorney Bird Martineau and Undersheriff Herman Hartwig, together with several deputies, returned from Middle Inlet late yesterday with the furs.

"The first trip made to Middle Inlet by Undersheriff Hartwig and Attorney Martineau was fruitless, according to a statement made this morning by Bird Martineau. 'When we arrived at Middle Inlet,' said Attorney Martineau, '*Finnegan* called up his attorney, James C. Morgan of Wausaukee, and the latter advised his client to shoot us rather than give us the furs. We believed *Finnegan* would do this and determined to come back to Marinette for reinforcements.' 'On the next trip,' Attorney Martineau continues, 'We took several deputies with us and got the furs.'

"The three attachments were made on the furs by the local attorneys for O. G. White of Amberg; H. S. Duquaine of Crivitz; B. H. Gahagen of Rock Island, Illinois, and an execution was secured for H. P. Christ of Wausaukee. The total claims, which are for goods said to have been sold to *Mr. Finnegan*, are estimated to aggregate $1,500.

"*Finnegan* is charged by the local attorneys with concealing the furs with intent to defraud the creditors."

The defendant served an answer setting up general denial, justification, and the defense of privilege. The plaintiff demurred to the portion of the answer pleading privilege. There had also been an order striking out certain portions of the answer. Thereupon an amended answer was served, consisting of a single admission, and as a first defense a general denial, as a second defense a justification, and as a third defense privilege was pleaded. This portion of the answer was as follows:

"It alleges further that said undersheriff, on said 29th day of March, 1917, attempted to levy upon and seize said furs as the property of said plaintiff upon a judgment that had been duly taken against said plaintiff by one H. P. Christ in the circuit court for Marinette county, and wherein the said circuit court had due jurisdiction thereof and had issued execution to said sheriff for the purpose of having said judgment satisfied out of the goods and chattels of said plaintiff, who was charged by the attorneys for said H. P. Christ, the said judgment creditor, and the plaintiffs in said actions where said writs of attachment were issued, with having assigned, conveyed, disposed of, and concealed

his property and being about to assign, convey, dispose of, and conceal his property, including said furs, with intent to defraud his creditors.

"That this defendant, as the publisher of said newspaper, believing that the facts hereinbefore set forth were true, without malice or any intent to injure plaintiff, but for the sole purpose, according to its established policy, of letting its readers and the public know about court proceedings in said Marinette county and the acts of its officers, including said sheriff, in the performance of their duties and their failures therein with reference to official acts, published said article in said newspaper."

As part of the third defense this allegation was made:

"For its third defense, this defendant refers to its second defense and makes it a part hereof with the same force and effect as if re-alleged herein."

In the third defense there was also the following language:

"And in mitigation of any damages to which the plaintiff might otherwise appear entitled by reason of the publication of said supposed libelous article, this defendant repeats and renews all and singular the matters stated in its several defenses herein set forth and will give evidence thereof in mitigation of damages as well as in justification and privilege."

Thereupon a stipulation was made between attorneys reciting some of the former proceedings and agreeing that the amended answer should stand as defendant's answer, and that a demurrer and motion then served should stand, and that the order entered on plaintiff's first demurrer and motion be considered as vacated, and that the court should enter an order based upon the annexed demurrer and motion and on said amended answer as if said first order had not been entered.

At this stage of the proceeding the plaintiff again filed a demurrer to the third defense on the ground that it did not state facts sufficient to constitute a defense. There was

combined with this a motion to strike out a few words in the second defense.

After argument the court entered an order overruling the demurrer to the third defense, also denying the motion to strike out a few words in the second defense.

For the appellant there were briefs by *Minahan, Minahan, Minahan & Duquaine* of Green Bay, and oral argument by *E. M. Duquaine.*

For the respondent there was a brief by *Martineau & Martineau* of Marinette, and oral argument by *P. A. Martineau.*

JONES, J. It is very clear that the publication complained of is libelous *per se.* It is a publication of language which tended to injure the plaintiff in his reputation and to degrade and disgrace him in society, and by a long line of decisions in this state such a publication is libelous.

It is urged that the newspaper only published statements communicated to it by a third person and that hence the publication is not libelous. But it seems well settled that this is no defense. Newell, Slander & L. (3d ed.) p. 425; *Haines v. Campbell,* 74 Md. 158, 21 Atl. 702; *Brewer v. Chase,* 121 Mich. 526, 80 N. W. 575; *World P. Co. v. Mullen,* 43 Neb. 126, 61 N. W. 108; *Dole v. Lyon,* 10 Johns. (N. Y.) 447.

We are convinced that no privilege is pleaded in the part of the answer demurred to. It is argued by respondent that it comes within the class of publications privileged as a report concerning judicial proceedings. Part of sec. 4256*a*, Stats., is as follows:

"The proprietor, publisher, editor, writer or reporter upon any newspaper published in this state shall not be liable in any civil action for libel for the publication in such newspaper of a true and fair report of any judicial, legislative or other public official proceeding authorized by law or of any public statement, speech, argument or debate in the course of such proceeding."

Doubtless the execution and writs of attachment were issued in the usual formal manner without having been drawn to the attention of the court.

Great freedom is allowed to parties in stating in their pleadings the facts relied on to establish their rights. Otherwise they would often be denied redress for their grievances. But it is not necessary to the administration of justice that a party who is thus privileged should cause charges or accusations he may make in his pleadings to be published to the world. Nor is it necessary that others should publish them before they have been brought to the attention of the court. Until that time the publication cannot be said to be a report of judicial proceedings. This was the rule at common law and has not been changed by statute. In a very full and able opinion by Mr. Justice DODGE in *Ilsley v. Sentinel Co.* 133 Wis. 20, 27, 113 N. W. 425, the court said:

"Unless obvious beyond reasonable doubt, we should be slow to believe in an intent to authorize and privilege publications so fraught with injury to individuals and for which justification in public policy or other reason is so entirely wanting. We do not find such purpose obvious, and therefore cannot think that the legislation in question goes beyond the rule of the common law in sheltering a report of any step in an action which does not in some way involve at least the attention and invited action of some judicial officer."

It is true the writs of attachment contained the name of the judge and were issued by the clerk with the seal of the court. The execution was signed by the attorney for the judgment creditor. Presumably the affidavit for attachment was signed by the plaintiff in the suit or by his attorney. We see no reason why any greater latitude should be given to the publication of these documents than to the publication of a complaint. The rule is well established in this state that the publication of pleadings or other preliminary papers to which the attention of no judicial officer has been called and no judicial attention invited is not privileged.

This rule would be of little effect if the contents of such documents could be given to the world under the pretense that in serving them a sheriff is a judicial officer or is acting in a judicial proceeding.

It is claimed by respondent's counsel that the acts of the sheriff in serving process were matters of such public concern as to be privileged. There is of course a large class of cases where publications are privileged or conditionally privileged because they relate to matters in which the public are interested. An English judge stated the rule somewhat broadly when he said:

"A clergyman with his flock, an admiral with his fleet, a general with his army, and a judge with his jury, are all subjects of public discussion. Whoever fills a public position renders himself open thereto. He must accept an attack as a necessary though unpleasant appendage to his office." *Kelly v. Sherlock,* L. R. 1 Q. B. Cas. 686.

But it is the law of this state that publications even concerning the acts of public officers containing insult, contemptuous phrase, or false and libelous statements of fact, are not privileged. *Putnam v. Browne,* 162 Wis. 524, 155 N. W. 910; *Buckstaff v. Viall,* 84 Wis. 129, 54 N. W. 111.

But the libelous language in this case was not written of a public officer but of a private citizen, and it is a private citizen who brings the action. On this subject it suffices to quote the language of Mr. Justice BARNES in *Pfister v. Milwaukee Free Press Co.* 139 Wis. 627, 121 N. W. 938:

"Neither do we think the defense of 'privilege' or 'fair criticism and proper comment' was permissible in this case. The plaintiff held no office and was not a candidate for any. Neither did he belong to any class which by seeking and inviting public patronage renders itself amenable to public comment and criticism which could not rightly be applied to a private citizen. It appears that the plaintiff is a private citizen, and a false and defamatory publication concerning such a one is not privileged merely because it may relate to some public matter."

Having decided that the publication was libelous and that it was not privileged, we regret that the state of the pleadings is such that we cannot sustain the demurrer. The second defense sets up at some length a justification. The third defense, which is demurred to, refers to the second defense and "makes it a part hereof with the same force and effect as if re-alleged herein." We cannot disregard this incorporation of the second defense into the third nor treat it on demurrer as mere surplusage. Hence the order must be sustained.

By the Court.—The order of the court is affirmed.

MAINVILLE, Plaintiff in error, vs. THE STATE, Defendant in error.

October 22—November 16, 1920.

Criminal law: Drawing from jury list: Absence of counsel: Continuance: Discretion of court: Jurors: Qualification: Examination: Assault.

1. Where counsel for the defendant had full opportunity to examine each juror and availed himself of such opportunity when the trial was entered upon, his absence at the time when names were struck by defendant from the jury list, under sec. 42, ch. 303, Laws 1913, was not prejudicial to defendant.
2. The refusal of the trial court to grant a continuance on the ground that defendant's counsel was busy trying a case in another court was not prejudicial to defendant, where another member of the firm of which such counsel was a member, or a lawyer employed by it, was present and ably defended accused.
3. Judicial action on an application for a continuance is a matter resting largely in the sound discretion of the trial court, and its refusal to grant it will not be interfered with unless resulting in manifest prejudice to the party asking it.
4. A juror who says he can and will give the defendant the benefit of the presumption of innocence; who can and will disregard any opinion he may have formed or expressed as to defendant's guilt or innocence; and who can and will try defendant

impartially on the evidence given in court and on that alone, is competent.

5. While reasonable latitude should be given parties in the examination of jurors to gain knowledge as to their mental attitude toward the issues to be tried for the purpose of aiding them in striking, if not successful in sustaining a challenge for cause, such scope does not extend to an inquiry into the juror's attitude towards a particular witness who is expected to testify in the case.

6. Under sec. 4377, Stats., an assault with intent to do great bodily harm is the same whether committed in a heat of passion or in a cool, deliberate state of mind.

7. In a prosecution for assault it was sufficient for the court to submit as possible verdicts, assault being armed with a dangerous weapon with intent to kill, under sec. 4376, Stats.; assault evincing a depraved mind regardless of human life, under sec. 4374*a;* assault with intent to do great bodily harm, under sec. 4377; assault without any felonious intent, under sec. 4696; and not guilty, where he correctly instructed the jury as to an assault and charged that if the intent to do great bodily harm was lacking they could find simple assault.

ERROR to review a judgment of the municipal court of Langlade county: ARTHUR GOODRICK, Judge. *Affirmed.*

Plaintiff in error, *John Mainville,* hereinafter called the defendant, was charged with the crime of an assault, being armed with a dangerous weapon, with intent to kill one Mrs. Lillie; also with assault under sec. 4374*a,* Stats., and with an assault with intent to do great bodily harm under sec. 4377. He was convicted of the latter and sentenced to three years' imprisonment in the state prison at Waupun. To review the correctness of such conviction he has sued out a writ of error to this court.

For the plaintiff in error there was a brief by *Martin, Martin & Martin,* and oral argument by *Gerald F. Clifford,* all of Green Bay.

For the defendant in error there was a brief by the *Attorney General, J. F. Baker,* assistant attorney general, and *A. N. Whiting,* district attorney of Langlade county, and oral argument by *Mr. Baker.*

VINJE, J. Since only procedural errors are assigned the facts need not be stated in detail. It appears that defendant was living in Antigo with his wife, who was about thirty years of age; that she had known one Parsons for over fifteen years. Parsons was a widower living with one Mrs. Lillie as his housekeeper, who defendant claims was also his mistress. Defendant further claims that Parsons had been intimate with his wife and that Mrs. Lillie had connived and assisted Parsons in securing such intimacy. It is claimed that the day before the shooting defendant first learned through his wife of the relations existing between her and Parsons, and that on the day of the shooting he learned that such intimacy had first occurred when defendant's wife was only thirteen years of age. The day of the shooting defendant bought a revolver and carried it with him. He and Parsons were railroad employees on the same run. Towards evening defendant went to the Parsons home, where he saw Parsons and Mrs. Lillie in the yard. He said, "I want to speak to you two a minute." "Me too?" Mrs. Lillie asked, and he said "Yes." The three walked to the rear of the house, where he asked Parsons to sit down and began to question him as to his relations with his wife. Mrs. Lillie became frightened and sought to go into the house to telephone, but the defendant told her to stay right there or he would shoot her. After another question to Mr. Parsons he fired a shot at him. The latter started to run away and defendant followed him past where Mrs. Lillie stood and fired another shot at Parsons, who died shortly after from the effects of his wounds. As soon as defendant had fired his last shot at Parsons he turned around and fired at Mrs. Lillie. The shot took effect in her side and she fell. While she was lying upon the ground defendant fired another shot at her and hit her in the neck. None of the wounds were fatal and Mrs. Lillie was a witness upon the trial.

We are satisfied from the whole evidence that the de-

fendant received a practical pardon from the jury as to the offense he was actually guilty of, and was convicted of the lesser offense because under the evidence they could not acquit him. The evidence of Mrs. Lillie and other eyewitnesses was too positive, direct, and conclusive, and the defense of self-defense which had secured an acquittal on a former trial for the killing of Parsons was not serviceable on this trial. The unwritten law was not effectively available against Mrs. Lillie.

Many errors of procedure are assigned and argued in the brief and orally. Only a few of them seem to be of sufficient importance to merit separate treatment.

On February 10, 1920, the court, in pursuance of an arrangement made some time previously with counsel for defendant, proceeded to draw a jury, or rather the nucleus for a jury, pursuant to sec. 42, ch. 303, Laws 1913. Twenty-eight names are drawn by the clerk from a jury list and each party strikes alternately six, and those whose names remain are summoned as a venire in the case, and each party is entitled to two peremptory challenges. The jury from then on is selected as in the circuit court. Defendant's counsel, Mr. Martin, was not present, though he knew when the jury would be drawn, and the court directed the defendant to strike or to call in counsel to assist him. The defendant exercised his strikes and the state its, and those not struck were summoned for the day of the trial, when the actual jury that tried him was impaneled. A great many talesmen were summoned before the jury was selected, and our attention is not called to any fact, nor can we conceive of any, whereby defendant was prejudiced by the absence of his counsel when the names were struck from the list drawn by the clerk. Counsel had full opportunity to examine each juror and he availed himself of that opportunity when the trial was entered upon.

Notwithstanding the fact that the case had been set for trial a long time in advance, at a date agreeable to counsel

for defendant when set, he was not present at the opening of the trial and asked for a continuance on the ground that he was engaged in the trial of another case in another court. The continuance was refused. Another member of the Martin firm, or a lawyer employed by the firm, was present, and it appears from the record that he ably defended the accused, and that the latter was in nowise prejudiced by the refusal of the continuance. Courts cannot await the convenience of attorneys, and especially of such busy attorneys as Mr. P. H. Martin. If they did, their work would never be done. It is perhaps a penalty that an able and busy lawyer pays that he cannot personally try every case that comes to his firm or that he would like to try. But in these days of shorthand service it is quite easy to put any member of the firm in possession of the theory and points of the case, especially so where, as here, all are able lawyers capable of handling difficult cases. This case presented no difficulties to the defense except the facts constituting the offense, and these were beyond the cure of the most able and skilful lawyer.

Judicial action upon an application for a continuance is a matter resting largely in the sound discretion of the trial court, and its refusal to grant it will not be interfered with unless resulting in manifest prejudice to the party asking it. *Miller v. State,* 139 Wis. 57 (119 N. W. 850) and cases cited on page 66. We find no such prejudice here.

Error is alleged because peremptory challenges to the jurors Hanzel and Uphoven were not sustained. On the *voir dire* the juror Hanzel testified:

> I am not acquainted with the defendant. I lived in Antigo at the time of the shooting. I followed the other case when it was tried. I attended the court during its trial. I have discussed the guilt or innocence of the defendant with reference to Mrs. Lillie, and I have expressed an opinion which I have at the present time and which it would take evidence to remove. It shouldn't be so firmly fixed in my mind that it would influence me in any way in rendering a

verdict. Whether it would "there is a question." The opinion I formed as to defendant's guilt or innocence in this case was based on my being present in the court room hearing the testimony in the last trial.

He further testified:

It is not true that it would require the introduction of evidence in this case before I would give way to the previous formed opinion I entertain. I would dismiss it if I sat on the jury. I could dismiss it. I don't think it would be impossible, but it might probably make it hard for me to do it. I think I was present at the trial twice; one of the days was when the attorneys were summing up the case to the jury.

The juror Uphoven testified:

I came to a conclusion that defendant was either right or wrong in the other case. I did not express any opinion on this case. It did not leave any impression on my mind. I heard so many different ways that I did not think which was what. I read in the Antigo Journal the entire trial in the newspaper report. That purported to state part of what the witnesses testified to, and I read it and discussed the trial of the case. According to the paper I formed an opinion as to the merits of that case. I did not know about the other case coming up. It was told to me how the shooting was done. They did not leave out the shooting of Mrs. Lillie. It was discussed just the same as the shooting of Parsons. At that time they stood on the same basis so far as my opinion was concerned. Independent of this actual court proceeding as to how the facts actually happened, I had an opinion on one just the same as I did on the other. I had no opinion as to whether he was right or wrong as to the shooting of this woman and shooting this man.

In *Baker v. State,* 88 Wis. 140, 59 N. W. 570; *Niezorawski v. State,* 131 Wis. 166, 111 N. W. 250; and in *Burns v. State,* 145 Wis. 373, 128 N. W. 987, this court has had occasion to discuss the question of what constitutes an impartial juror. The rule deducible from these and other cases is that a juror who says he can and will give the defendant the benefit of the presumption of innocence; who

can and will disregard any opinion he may have formed or expressed as to his guilt or innocence, and who can and will try him impartially upon the evidence given in court and upon that alone, is competent. In this age of universal newspaper reading and publication of news any other rule would be unworkable. An impartial jury is all the law requires. It is not necessary to have one ignorant of all the facts which the evidence may disclose or devoid of all impressions formed from reading, hearsay, or a partial disclosure of the facts. Justice is arrived at from knowledge impartially applied; and the conscientious juror who regards the sanctity of his oath and senses the importance to the defendant and to the state of a just verdict will make true deliverance upon the evidence notwithstanding tentative opinions or impressions previously acquired from newspaper reading or from a partial knowledge of the facts in the case. 16 Ruling Case Law, 265.

Error is also alleged because the court refused to permit the jurors to be examined as to the general reputation of Mrs. Lillie. It is said that, since the state had announced that Mrs. Lillie would be a witness in the case, defendant had a right to know the attitude of the jurors towards her testimony. While reasonable latitude should be given parties in the examination of jurors to gain knowledge as to their mental attitude towards the issues to be tried for the purpose of aiding them in striking, if not successful in sustaining a challenge for cause, such scope does not extend to an inquiry into the juror's attitude towards a particular witness who is expected to testify in the case. *Chybowski v. Bucyrus Co.* 127 Wis. 332, 106 N. W. 833. To so extend it would be to permit parties to get an advance opinion of the juror as to the credit he would give a certain witness. This jurors should not be required to give. 16 Ruling Case Law, 281. Their duty is to weigh the whole evidence when it is in and then to give such credit and weight to the testimony of each witness as in their judgment it is entitled to after they have seen the witness on the stand and can judge

of the reasonableness of his testimony, his apparent truthfulness, and willingness to testify. The general reputation of a prospective witness is not an issue or even a collateral issue when the jury is impaneled.

Defendant offered to prove statements made to him by his wife the day before and the day of the shooting, as to her relations to Parsons. They were offered in evidence for the purpose of showing that the shooting was done in a heat of passion. Had defendant been charged with murder, then the evidence would have been competent as tending to reduce the killing from murder to manslaughter. But the offense of which defendant was convicted was one not depending upon the question whether or not it was done in a heat of passion. Assault with intent to do great bodily harm is the same whether committed in a heat of passion or in a cool, deliberate state of mind. Nor was there an issue before the jury under either of the charges against the defendant that made heat of passion a factor in the case. No claim is made that defendant had no mental capacity to form an intent. The court therefore properly rejected the evidence.

The court submitted the following verdicts to the jury: (a) Assault, being armed with a dangerous weapon, with intent to kill, under sec. 4376, Stats.; (b) assault evincing a depraved mind regardless of human life, under sec. 4374*a*; (c) assault with intent to do great bodily harm, under sec. 4377; (d) assault without any intent, under sec. 4696; and (e) not guilty. Full and correct instructions as to each offense were given by the court. It correctly defined an assault and told the jury that if the intent to do great bodily harm was lacking they could find simple assault. This, under the circumstances, in connection with the submission of a verdict of not guilty, was sufficient. The jury found an intent to do great bodily harm upon abundant competent and credible evidence, so simple assault dropped out of the case. The jury never reached the question.

The other errors assigned are not well taken. We are

satisfied that the defendant had a fair and impartial trial, was ably defended, and should be well satisfied with the result considering the gravity of the charges against him and the strong evidence supporting them.

By the Court.—Judgment affirmed.

SCHENNING and others, Respondents, vs. DEVERE & SCHLOEGEL LUMBER COMPANY, Appellant.

November 16—December 14, 1920.

Sales: Transfer of title: Goods sold f. o. b. cars: Unreasonable delay in shipping instructions by buyer: Destruction of goods: Delay of seller in presenting claim.

1. Under a contract for the sale of lumber f. o. b. cars at a certain siding, the title to the lumber, which had been brought to the siding for loading but had not been loaded on the cars, remained in the seller.
2. Where the seller had written the buyer urging immediate orders for shipment of the lumber because of the danger from fire while it remained piled near the railroad track, and the buyer replied promising to send shipping instructions in a day or two, a finding by the trial court that a delay of ten days in sending the shipping instructions was unreasonable under the circumstances, so as to render the buyer liable for the loss under sub. (2), sec. 1684*t*—22, Stats., placing goods at the risk of the party at fault in delaying delivery, was proper.
3. The fact that the seller failed to make any claim against the buyer for six months after the loss does not defeat his right of action.

APPEAL from a judgment of the circuit court for Marathon county: A. H. REID, Circuit Judge. *Affirmed.*

In February, 1916, the plaintiffs, copartners doing business at Silver Lake, Kenosha county, made a contract with the defendant corporation, doing business in Milwaukee, for the sale of a certain lot of lumber then at a mill near Rib Lake in Taylor county in the northern part of the state. The milling of the lumber was to be done by a third person

then under contract with plaintiffs and to be hauled about seven miles to a spur track for shipment.

The parts of the contract material here were as follows:

"Prices f. o. b. cars Stumps spur." . . .

"Shipments to be made immediately except that some of 2-inch No. 1 and No. 2 hemlock may have to be piled for a short time at the spur to permit disposition in mixed cars."

On March 1, 1916, the first car was shipped, and by March 27th all the lumber under the contract had been brought to the spur. On March 30th the last shipment was made. No shipping orders were given between March 25th and May 8th, when a forest fire at the spur destroyed the balance of the hemlock.

It is agreed that the purpose of storing the hemlock which was destroyed by the fire at the siding was to permit the defendant to make a different disposition of such particular lumber than for the balance of the contract and that it was for defendant to order the shipments.

On March 20, 1916, plaintiffs wrote defendant calling attention to the danger from fire as soon as snow is off the ground and requested orders for loading the lumber. On April 24th plaintiffs again wrote to defendant stating, among other things, as follows:

"It now becomes urgently necessary to again call your attention to the absolute fact that the long delay in removing our lumber from sidetrack is every day adding to the danger of fire. . . . If you cannot dispose of this lumber at once or cannot handle it in your yard, then please let us know at once. For then we will load at once and ship to Silver Lake. At any rate, the lumber cannot be left lying in the woods any longer. . . . We will be glad to at once start this lumber to moving if you cannot handle it. We were not looking for a delay of this sort. . . . we are all exceeding uneasy about our lumber. You know very well that lumber piled close to the railroad, where there is dry grass and leaves, is in immediate danger every time a locomotive moves by. Kindly let us hear your wish immediately."

In answer to that and others defendant wrote on April 28th as follows:

"The shipments of the lumber did not work at all as we had planned. The rushing through of shipments and mixing of stock prevented us selling such parts of this lumber as we had intended to dispose of. Other things worked to our disadvantage. We will tell you about it when we see you personally.

"As to the lumber still left at the spur: We could have sold this stock ten times over at fair prices. But our customers want certain sizes and certain grades, and from what our man says and from the experience we have had, we can see that the people up there will be unable and unwilling to handle and ship as would be required. May have to take the balance of the lumber to Milwaukee and will let you know in a couple of days."

There was no direct response to this letter.

On May 9th the plaintiffs notified defendant of the loss by fire of the day before, but before receipt of such information defendant wrote on May 10th to plaintiffs saying, among other things, as follows:

"You may write your people to send the balance of the lumber to us at Milwaukee. . . . Load the 2 x 4 in a car for themselves. . . . We want to switch this car to one of our customers in Milwaukee. . . .

"We would have preferred to handle this lumber differently and more to our advantage, but we cannot see how it can be done under the circumstances."

Subsequent correspondence was had between the parties, but no claim made by plaintiffs on account of this fire loss until the following November or December. Suit was then brought, and at the close of the trial respective motions made for a directed verdict, and the court thereupon answered the questions of the special verdict which had been prepared for the jury and upon those directed judgment in favor of the plaintiffs for the agreed amount of the value of the hemlock thus destroyed in the sum of $2,233.18,

with interest and costs, and from such judgment defendant has appealed.

For the appellant there was a brief signed by *Lorenz & Lorenz* of Milwaukee, attorneys, and *Franklin E. Bump* of Wausau, of counsel; and the cause was argued orally by *Ira S. Lorenz.*

Herman Leicht of Medford, for the respondents.

ESCHWEILER, J. The plaintiffs asserted in the complaint and upon the trial that by the action of the parties, including defendant's delay in ordering the shipment of the hemlock, title to it was to be considered as having passed before the fire and for that reason the loss should be borne by defendant. The trial court, however, held, and we think properly, that under the terms of the contract the title was not intended to pass until the plaintiffs had performed the duty resting upon them under the contract of loading the same upon cars.

Judgment was directed by the trial court on the ground that the loss was properly chargeable against defendant by reason of its delay in giving orders for its shipment, and under the rule of law whose statutory embodiment is found in sub. (2), sec. 1684*t*—22, Stats., which provides that, where a delivery of personal property under a contract of sale has been delayed through the fault of either buyer or seller, the goods are at the risk of the party at fault as regards any loss which might not have occurred but for such fault.

Appellant contends with quite a persuasive argument that the conduct of the parties in recognition of their apparent respective rights and liabilities under the contract, and particularly by reason of the plaintiffs failing to protest against the suggestions made by defendant in its letter of April 28th, quoted above, and further failing to immediately ship the hemlock without waiting for orders, was such an acquiescence in the delay as to leave the liability for the

destruction of this property where it originally rested under the contract, namely, on the plaintiffs as owners.

Under the evidence it became, however, purely a question of fact as to whether or not the failure to give shipping orders by defendant, even after the letter of April 28th, was an unreasonable period of delay in view of the known and recognized danger from forest fires. What would have been a reasonable time for ordering the shipment while the snow was still on the ground, when no such danger was present, was not necessarily the standard by which to judge the element of reasonable time after such a period and when danger was much more possible owing to the known condition in the woods.

The plaintiffs might well be considered as reasonably waiting from day to day for shipping orders in reliance upon the promise of defendant in its letter of April 28th of giving definite information within a day or two.

That the plaintiffs failed to assert a claim for such loss for some months after their cause of action actually arose does not of course defeat their right of action.

We cannot satisfy ourselves that the findings of the court in this regard were clearly wrong and the judgment must be affirmed.

By the Court.—Judgment affirmed.

BOOKER, Respondent, vs. PELKEY and another, imp., Appellants.

November 16—December 14, 1920.

Fraud: Conspiracy: Liability of persons acting on concerted plan: Rule of damages: Misrepresentation of owner's price.

1. A complaint in an action to recover damages for misrepresentations in the sale of land to plaintiff which alleged that three of the five defendants made actionable representations and charged that all of the defendants planned and conspired to conceal material facts from plaintiff and helped to plan the

ways and means by which the fraud was consummated, states a cause of action against the two defendants who did not participate in the misrepresentations.

2. Such a complaint is based on a concerted plan of action to defraud, which renders all defendants liable for the injury, and is not subject to the objection that it does not show a conspiracy to defraud by making false and material representations.

3. A misrepresentation that the price to a prospective purchaser is the lowest price at which the owner would sell is a misrepresentation as to a fact, not a matter of opinion, and is actionable if false. *Estes v. Crosby*, 171 Wis. 73, followed.

4. The complaint, alleging that defendants participated in a common plan to defraud plaintiff, states a single cause of action against all of them, although they took different parts in carrying out the plan; and the same rule of damages should be applied to each defendant.

APPEAL from an order of the circuit court for Oconto county: W. B. QUINLAN, Circuit Judge. *Affirmed.*

In the opinion of the trial judge the following summary is given of the allegations of the amended complaint setting forth the misrepresentations claimed which for the most part will suffice to present the questions raised by the demurrer:

"1. That Robert Sharp was an heir to the property in question and was interested in the sale because of such heirship, and that the property had to be sold.

"2. That the farm had always been run properly.

"3. That the farm was in good condition.

"4. That the farm was not in a run-down condition through the neglect of fertilizer or cultivation.

"5. That the owner wanted $7,500 for the farm.

"6. That the owner would not take less than $7,500 for it.

"7. That the two back sides of one of the forties of the described land was fully and completely fenced.

"9. That the defendants, for the purpose of inducing plaintiff to buy said land, conspired together and planned to conceal the fact that Robert Sharp was a commission land agent.

"10. And planned further to induce this plaintiff, through the agency of Robert Sharp, to go to Coleman that the deal

would be consummated through Effie Pelkey at the Coleman State Bank at Coleman.

"11. That in furtherance of the conspiracy to defraud the plaintiff, the defendant *S. G. Pelkey* instructed Robert Sharp in regard to the part he had to play in the conspiracy as heretofore alleged, and prevented this plaintiff from gaining knowledge of the fact that Robert Sharp was not an heir to said property, but was a land agent working on a commission.

"12. That in furtherance of the conspiracy to defraud the plaintiff, the defendant *S. G. Pelkey* arranged for a conference between Robert Sharp and Effie Pelkey at Coleman concerning the manner in which the deal was to be made and closed.

"13. And still furthering the conspiracy to defraud the plaintiff, the said *S. G. Pelkey,* unknown to the plaintiff, advised and consulted with Effie Pelkey in regard to drawing of the papers and prevented the plaintiff and the vendor, George Pelkey, from at any time during the entire deal seeing or conversing with each other or from learning the true facts in regard to the selling price of said property.

"14. That the defendant *L. W. Brazeau* aided the defendant *S. G. Pelkey* in all matters as heretofore alleged in regard to *S. G. Pelkey,* and was the receiving agent of the $500 paid down by this plaintiff.

"15. That Robert Sharp, Effie Pelkey, the defendant George Pelkey, knowing of the fraud so practiced upon him by the said defendants Robert Sharp, Effie Pelkey, *S. G. Pelkey,* and *L. W. Brazeau,* wrongfully agreed with the said other defendants to appropriate the said $2,000 which was received over and above the price actually wanted for said farm, by dividing the same among themselves. That the same was divided and appropriated to their own use."

The complaint also alleged that the market value of the land would not at the time exceed $5,500, but that if the representations had been true it would have been $7,500. There were other allegations more fully stating the business and relations of the defendants, and stating that plaintiff had lately come from Canada and did not want to purchase through brokers, and stating in detail that Sharp was not interested as an heir.

For the appellants the cause was submitted on the brief of *Classon & O'Kelliher* of Oconto.

For the respondent there was a brief by *Classon & Whitcomb* of Oconto, and oral argument by *A. J. Whitcomb.*

JONES, J. Three of the defendants have not demurred to the complaint but have answered. It could not seriously be argued that as to them the complaint states no cause of action. It alleges a series of misrepresentations by them as to material facts whereby the plaintiff was misled and deceived as to the relations of one of the parties to the vendor, the condition of the premises and their productiveness, that the lowest asking price of the owner was $7,500, and that the plaintiff was thereby induced to pay $7,500 for land only worth $5,500.

Although it is not charged that the other two defendants made these representations, there were allegations that all the defendants planned and conspired to conceal from the plaintiff that Sharp was a broker, which under the circumstances was a very material fact; that they helped to plan the ways and means by which the fraud could be consummated; that the appellant *Pelkey* took an active part in giving instructions as to concealing material facts, arranging conferences, and drawing papers; and that the appellant *Brazeau* "aided the defendant *S. G. Pelkey* in all matters as heretofore alleged in regard to *S. G. Pelkey,* and was the receiving agent of the $500 paid down by this plaintiff." It is further alleged that the appellants shared with the others in the proceeds of the fraud.

In our opinion the allegations of the complaint can only lead to one conclusion, namely, that all the defendants, by fraud and misrepresentation, obtained from the plaintiff $2,000 more than the land was worth and more than the asking price of the vendor, and unlawfully appropriated that amount to their own use. It is argued by appellants' counsel that the complaint does not show a conspiracy to defraud by making false and material representations. This argu-

ment is well answered by the language of Mr. Chief Justice WINSLOW in *Hull v. Doheny,* 161 Wis. 27, 152 N. W. 417:

"It is not, as seems to have been thought, an action of conspiracy, but an action to recover damages for a wrong committed by a number of persons who have agreed to act together to accomplish that wrong, all being liable for all acts committed by any one of their number in furtherance of the concerted plan of action. The conspiracy is alleged simply as a means of connecting all the defendants with the overt acts of each individual."

The appellants' counsel also rely on their claim that false representations by which plaintiff was induced to pay $2,000 more than was asked or wanted by the owner, and that he would not take less than that amount, were not actionable. Although in other states there is authority for this contention, we cannot agree to it. Such misrepresentations are not mere statements of opinion, but relate to facts known to defendants and unknown to the plaintiff. They are statements well calculated to influence a buyer and on which he has a right to rely. The rule that such misrepresentations are actionable was declared by this court in a recent case. *Estes v. Crosby,* 171 Wis. 73, 175 N. W. 933. See 8 A. L. R. 1377 and annotation.

The argument that two causes of action are improperly joined is not sound. According to the allegations of the complaint, although the several defendants took different parts in the plan to defraud, their efforts were directed to a common end and they were all sharers in the unlawful gains. We do not agree that there should be a different rule of damages applied to any of the defendants. They would all be liable for the actual loss suffered by the plaintiff, that is, the difference between the value of land at the time of the sale and its value as represented, or the difference between the asking price and the amount he was fraudulently induced to pay.

By the Court.—Order affirmed.

KOVNESKY, Respondent, vs. STODOLA and others, Appellants.

November 16—December 14, 1920.

Negligence: Bystander injured by persons engaged in rough play: Contributory negligence.

1. Where the evidence showed that three defendants who were more or less intoxicated were engaged in a frolic in a saloon, and one of them pushed another against the third, who was thrown against plaintiff, knocking him down and injuring him, the jury were warranted in finding that all three defendants were negligent.
2. The fact that plaintiff, some distance away from the defendants, was standing with his back to the bar and his legs crossed, does not make him guilty of negligence as a matter of law, as the jury had a right under the evidence to find that he was not taking part in the fun and frolic going on between the defendants.
3. The question whether plaintiff had any connection with the frolic which produced his injuries is for the jury.

APPEAL from a judgment of the circuit court for Oconto county: W. B. QUINLAN, Circuit Judge. *Affirmed.*

On June 30, 1919, the plaintiff, defendants, and some others were in the saloon of one Kralovetz at a place called Klondike, Oconto county. The injury occurred somewhere about midnight, and during the night many people patronized the saloon, coming, going, and drinking intoxicating liquor.

At the time of the injury to the plaintiff the defendants were at the bar quite close together, the plaintiff standing with his back to the bar at some distance from the defendants. The claim of the plaintiff is that the defendants, or one of them, pushed the other two defendants with such force against the plaintiff as to throw him from his position at the bar, knock him down and produce the injury.

Action was brought by the plaintiff for the injury sustained on account of the acts of the defendants. Several

defenses were set up and the case tried to the court and a jury and the following verdict returned:

"(1) Did the defendants fail to exercise ordinary care in their conduct toward the plaintiff at the time he was injured? *A.* Yes.

"(2) If you answer the first question 'Yes,' then answer this: Was such failure to exercise ordinary care the proximate cause of plaintiff's injury? *A.* Yes.

"(3) If you answer the first and second questions 'Yes,' then answer this: Did any want of ordinary care on the part of the plaintiff proximately contribute to produce his injury? *A.* No.

"(4) Was plaintiff a participant in the frolic at or about the time he was injured? *A.* No.

"(5) At what sum do you assess plaintiff's damages? *A.* $600."

Judgment was rendered on the verdict, from which the defendants appealed.

The only question presented in this case is whether the verdict is supported by the evidence.

Three main points are discussed by counsel for defendants: First, that no negligence was shown on the part of defendants; second, that the plaintiff was guilty of contributory negligence; third, that the injury to the plaintiff was the result of a frolic in which he participated with the defendants, and hence no liability exists under such circumstances.

For the appellants there was a brief by *Minahan, Minahan, Minahan & Duquaine* of Green Bay, and oral argument by *V. I. Minahan.*

For the respondent there was a brief by *Classon & Whitcomb* of Oconto, and oral argument by *A. J. Whitcomb.*

KERWIN, J. 1. It is vigorously insisted by counsel for defendants that there is no evidence of negligence, and it is argued that, especially as regards defendant *Hooper*, no act of *Hooper* amounted to negligence. There is credible evi-

dence, however, tending to show that the three defendants were connected in the frolic and their acts concurred in producing the injury complained of.

It also appears that the push *Stodola* administered to *De Cleene* was of sufficient force to throw *De Cleene* against *Hooper,* and *Hooper* against plaintiff. If this act was understood between the three defendants and calculated to displace or throw plaintiff from his position at the bar and the defendants concurred in it, it was a negligent act, and while some argument is made to the effect that *Hooper* was stupidly drunk there is also evidence that he knew what he was doing. There is evidence as follows: "*Q. Hooper* was pretty well intoxicated, was he not? *A.* Well, he was I guess like the rest of us—I don't know—maybe more and maybe less." There is also credible evidence that *Hooper* acted in concert with the other defendants during the evening and knew what he was doing.

On the question of negligence of defendants as well as other questions the case was fairly submitted to the jury, and the jury had a right to find that all three defendants were guilty of negligence and their acts produced the injury complained of.

It is also argued that defendant *Stodola* could not reasonably have anticipated that his act would produce the result or injure the plaintiff, but the evidence shows that *Stodola* made the push with his shoulder, and evidently it was a very hard push which produced the result shown by the evidence.

On the whole case the court is convinced that the jury was warranted in finding the defendants guilty of negligence. The learned trial judge below rendered a written opinion in the case, and among other things said:

"And the defendants, without any warning or caution, shoved against the plaintiff and threw him to the floor, causing him serious injury. I think the act of the defendants was negligence on their part—in fact, was an assault upon the plaintiff without any provocation whatever."

2. It is contended that the plaintiff was guilty of negligence as a matter of law. The court is satisfied that this contention cannot be sustained. The evidence tends to show that the plaintiff was some distance away from the defendants at the time and standing with his back to the bar and his legs crossed. Counsel for defendants argue that he was pivoting on his heel and his position under the circumstances made him negligent. But he was taking no part in the fun or frolic which was going on between the defendants at the time; at least the jury had a right to so find. The court finds no merit in this contention.

3. It is further contended that the parties were engaged in a frolic and that plaintiff was a participant in the frolic and hence cannot recover. The court finds this contention also without merit.

For the purpose of irritating and annoying *Hooper,* who was under the influence of liquor, the suggestion was made that *Hooper* had struck *Stodola,* when in fact he had not. The question was asked of several present whether *Hooper* had not struck *Stodola,* and the plaintiff, among others, being asked, answered that *Hooper* had struck *Stodola,* although he knew that *Hooper* had not done so. Counsel for defendants argue that this answer by plaintiff tends to make him a participant in the frolic. On this point the court below in his written opinion further says:

"The only thing that he did to show a participation in the activities that were taking place, provoked by the defendants, was when one of them asked him if he had not heard a certain statement, and he acquiesced and said he had, which was not the truth. Whether his motive in assenting to this suggestion was for the purpose of aiding in the fun or for the purpose of getting rid of a drunken man who put the question to him, is not so clear."

It appears that at the time of the accident in question and for some time prior thereto the plaintiff was standing some distance away from the defendants and taking no part in

their frolic, but talking to other persons who were in no way connected with the frolic.

The court thinks it was clearly for the jury to say whether under all the circumstances the plaintiff had any connection with the frolic which produced the injury. On the question of participating in the frolic the court below, in his charge, said:

"The mere presence of the plaintiff, *Kovnesky*, at the saloon does not render him a participant in the frolic going on, but if you find from the evidence that he did any act to countenance or approve *Stodola, De Cleene,* or *Hooper* in their frolic, he then participated in it. In other words, if he was a looker-on he did not participate, but if he gave any encouragement or aid to *Stodola, De Cleene,* or *Hooper,* or to their plans, then he has participated, and you should answer the question Yes."

This charge was certainly very fair and appears sufficiently favorable to the defendants.

It would serve no useful purpose to spend time discussing the evidence; it is sufficient to say that the case was fairly tried and that the verdict is supported by the evidence.

By the Court.—The judgment is affirmed.

SMITH and wife, Respondents, vs. YELLOW CAB COMPANY and another, Appellants.

November 16—December 14, 1920.

Master and servant: Servant exceeding instructions of master: Respondeat superior: Evidence: Reports in preparation for trial: Trial: Persistence in showing defendant had liability insurance: Excessive damages: Appeal.

1. Where a taxicab driver, in violation of his master's directions, took passengers outside of the city limits, where they left the vehicle without paying, he was, while returning home, within the scope of his employment so as to render the master liable for his negligence under the doctrine of *respondeat superior.*

2. In a consolidated action by husband and wife against a taxicab company for damages for a collision with their automobile, where a witness who had made a report on the accident, having stated that he was indirectly an employee of the defendant company, in response to further questions testified that he was an employee of an automobile liability company, it was improper for counsel for plaintiffs to persist in their attempts to show that the defendant was insured.
3. In an action for damages resulting from a collision, a report by an employee of a liability company insuring defendant which covered an interview with the plaintiffs was inadmissible in evidence.
4. Where the jury, notwithstanding misconduct by plaintiffs' counsel in attempting to show that defendant was insured, did not make an excessive award of damages to the wife, it will be presumed that the jury, in assessing the husband's damages, was not prejudiced.
5. Where the only matters in issue were the amount of damages and whether defendant's employee at the time of the accident was acting within the scope of his employment, and the undisputed facts showed as a matter of law that the employee was so acting, misconduct of plaintiffs' counsel in attempting to show that defendant was insured will not be deemed prejudicial, the damages awarded not being excessive.

APPEAL from a judgment of the circuit court for Racine county: E. B. BELDEN, Circuit Judge. *Affirmed.*

Actions by husband and wife, consolidated, to recover for personal injuries and for damage to *Mrs. Smith's* automobile sustained in a collision with defendants' automobile. The jury found that the driver of defendants' automobile at the time of the collision was acting within the scope of his employment and that *Mr. Smith* sustained damages in the sum of $3,000. Other findings are not challenged. Defendants appealed from a judgment in favor of plaintiffs because they claim there is no basis for the finding that their driver was within the scope of his employment at the time of the collision; because the damages to *Mr. Smith* are excessive; and because of error in receiving incompetent and prejudicial evidence.

For the appellants there was a brief by *J. Elmer Lehr*

and *Raymond J. Cannon,* both of Milwaukee, attorneys, and *William W. Storms* and *Storms, Foley & Beck,* all of Racine, of counsel; and the cause was argued orally by *Mr. Lehr.*

For the respondents there was a brief by *Simmons & Walker* of Racine, and oral argument by *John B. Simmons.*

VINJE, J. It appears that about 11 o'clock in the evening of October 16, 1918, a couple of men applied at defendants' garage and office for a car or cab in which to ride around the city. Defendants sent one of their drivers, Haase, to take the men around the city, and, as they claim, instructed him not to leave the city. Haase took them from saloon to saloon and drove them to Cudahy and further south. He claims he was directed by them to do so, and also claims he got lost. When they reached Kenosha the men jumped out, and, without paying the cab hire, told Haase to "beat it home." On his way back he collided with the *Smith* automobile.

It is claimed that since Haase disobeyed instructions in taking the men out of the city he was outside the scope of his employment, and the cases of *Steffen v. McNaughton,* 142 Wis. 49, 124 N. W. 1016; *Gewanski v. Ellsworth,* 166 Wis. 250, 164 N. W. 996; and *Youngquist v. L. J. Droese Co.* 167 Wis. 458, 167 N. W. 736, are especially relied upon to sustain the claim. If it were true that a servant is outside the scope of his employment whenever he disobeys the orders of his master the doctrine of *respondeat superior* would have but scant application, for the master could always instruct his servant to use ordinary care under all circumstances. The servant's negligence would therefore always be contrary to orders and the nonliability of the master would follow. But such is not the law. The servant is within the scope of his employment when he is engaged in the master's service and furthering the master's business though the particular act is contrary to instructions. The

purpose of the service rendered by the employee, and not the method of performance, is the test of whether or not the servant is within the scope of his employment. If the purpose is to further the master's business and not that of the servant, the latter is within the scope of his employment though he be negligent or disobeys orders as to the method of its execution. *Wilson v. Noonan,* 27 Wis. 598; *Bergman v. Hendrickson,* 106 Wis. 434, 82 N. W. 304; *Cobb v. Simon,* 119 Wis. 597, 97 N. W. 276; *Johnston v. C., St. P., M. & O. R. Co.* 130 Wis. 492, 110 N. W. 424; *Schultz v. La Crosse City R. Co.* 133 Wis. 420, 113 N. W. 658; *Daley v. C. & N. W. R. Co.* 145 Wis. 249, 129 N. W. 1062; *Ratcliffe v. C., M. & St. P. R. Co.* 153 Wis. 281, 141 N. W. 229; *Gray v. C. & N. W. R. Co.* 153 Wis. 637, 142 N. W. 505; *Oakes v. Marshall-Wells H. Co.* 158 Wis. 165, 147 N. W. 832.

In the present case Haase was, even under defendants' claim, furthering their business. He was driving for hire to be paid them. That it was not paid is immaterial. The cases relied upon by the defendants are therefore not applicable. In the *Steffen Case* the servant was using the automobile to get his dinner. Under the terms of the service he was then not in the master's employ at all. So in the *Gewanski Case,* the automobile was used by the servant in going home in the evening after his employment had ceased; and in the *Youngquist Case* the servant, without knowledge of the master, had taken the automobile for a trip of his own. In these cases the servants were not engaged in the master's business at all. This is not such a case.

Counsel for plaintiffs called one Kersey, under sec. 4068, Stats., who had interviewed the plaintiffs in regard to the accident and who was believed to have made a report thereon to some one. He was asked, "Are you an agent of the *Yellow Cab Company? A.* No, sir. *Q.* Are you an employee of the *Yellow Cab Company? A.* Indirectly. *Q.*

What do you mean by 'indirectly'? *A.* I am an employee of the insurance company." After the name of the insurance company was elicited there followed repeated efforts to ascertain if the company insured the *Yellow Cab Company,* and, if so, for injury to person as well as to property. The court sustained the objections to all such questions, but they were repeated again and again in varying form, and the record thereof covers four or five printed pages. Such persistent effort on the part of counsel to prejudice the jury against defendants by attempting to show they were insured was error (*Chybowski v. Bucyrus Co.* 127 Wis. 332, 106 N. W. 833; *Howard v. Beldenville L. Co.* 129 Wis. 98, 108 N. W. 48; *Kellner v. Christiansen,* 169 Wis. 390, 172 N. W. 796), and but for reasons hereinafter stated would result in a reversal. Trial courts, when such attempts are made, should firmly check them and admonish counsel not to persist therein. In this case the effort to nullify or ignore the law of the state might well merit a reversal if offending counsel instead of plaintiff bore the burden thereof. The report, if one were made, was not admissible in evidence. *Lehan v. C. & N. W. R. Co.* 169 Wis. 327, 172 N. W. 787; *Kellner v. Christiansen,* 169 Wis. 390, 172 N. W. 796. Counsel, therefore, when in answer to the proper question, "What do you mean by indirectly?" the witness said "I am an employee of the insurance company," should have promptly discontinued further inquiries as to insurance.

It remains to determine if the error is so prejudicial as to call for reversal. In the case there were but two important questions, namely, Was Haase within the scope of his employment? and, if so, What were plaintiffs' damages? The former is a question of law from undisputed facts, and if the jury had answered it otherwise than it did the answer could not stand. The error therefore did not prejudicially affect the question of liability. As to damages it appears that the jury assessed *Mrs. Smith's* damages to her person at $250 and to her automobile at $800. These

assessments are not challenged as excessive. The jury were not therefore prejudiced in passing upon the damage to the automobile or to the person of *Mrs. Smith,* for they satisfactorily assessed such damages. If they were not prejudiced in the assessment of those damages it cannot be said that they were prejudiced in assessing *Mr. Smith's* damages, which were of a like character to those to the person of *Mrs. Smith.* We must therefore hold that no prejudicial error resulted from the efforts of counsel to show that defendants were insured.

An examination of the evidence as to the injury resulting to *Mr. Smith* from the collision satisfies us that the damages awarded were not excessive. The trial court approved of the award and we cannot disturb it.

By the Court.—Judgment affirmed.

MOLTER and wife, Respondents, vs. SPENCER, Appellant.

November 16—December 14, 1920.

Landlord and tenant: Tenancy from month to month: How terminated: Notice to quit: "Month's notice."

1. While a tenancy at will or at sufferance was at common law different from a periodic tenancy, sec. 2183, Stats., requiring the landlord to give notice of the termination of the tenancy in writing, has operated to remove the distinction between the two tenancies, and the words "tenancy at will" in the statute include periodic tenancies.
2. A month's notice pursuant to said sec. 2183, in order to terminate a tenancy, must expire at the end of the rent month; and by "one month's notice" to quit is meant the number of days in the calendar month in which the notice is given.
3. In case of a tenancy, where the end of the rent month, beginning February 25th, was the 24th of March, and the 25th of March was the first day of a new period, the landlord's notice, pursuant to sec. 2183, served February 25th, and attempting to terminate the tenancy March 25th, was insufficient, as lacking one day of being a month's notice. [If the

notice had been given one calendar month prior to the last day of the rent month, the effect of requiring the tenant, by the terms of the notice, to remove on the first day of a new term, not determined.]

APPEAL from a judgment of the circuit court for Kenosha county: E. B. BELDEN, Circuit Judge. *Reversed.*

Unlawful detainer. Plaintiffs were the owners of premises located at No. 456 Grover street in the city of Kenosha. On the 25th day of August, 1919, the premises were rented to the defendant and the following receipt for the first month's rent given:

"1919.

"Received from *H. M. Spencer* twenty-five dollars for rent of second flat at 456 Grover street from 8/25 to 9/25, 1919."

The defendant paid the rent each month thereafter. On the 25th day of February, 1920, the plaintiff served upon the defendant a notice to quit, as follows:

"*Please take notice* that you are required to surrender and deliver up possession of the up-stairs and that part of the basement occupied by you of the premises commonly known as, designated and numbered No. 456 Grover street, and remove therefrom on the 25th day of March, A. D. 1920, for the reason that we desire to elect and do now elect to terminate the tenancy under which you now hold and under which you went into possession of the same, and in pursuance of the provisions of the statutes of the state of Wisconsin in such cases made and provided.

"Dated this 25th day of February, A. D. 1920."

The defendant declined to remove from the premises and this action was begun in the municipal court of Kenosha county to oust him. Plaintiff had judgment, and the defendant appealed to the circuit court.

The circuit court was of the opinion that the notice served on the 25th day of February, terminating the tenancy on the 25th day of March, was a sufficient compliance with the

statute and gave judgment accordingly, from which the defendant appeals.

Frank S. Symmonds of Kenosha, for the appellant.

For the respondents the cause was submitted on the brief of *Edward F. Higgins* of Kenosha.

ROSENBERRY, J: It is not disputed that the tenancy was a tenancy from month to month and could be terminated only in the manner prescribed by law for the termination of such tenancies. Sec. 2183, Stats. The defendant endeavors to draw a distinction between tenancies at will and sufferance and periodic tenancies. While a tenancy at will or at sufferance was, at common law, a different thing than a periodic tenancy, our statute requiring the landlord to give notice in writing has operated to remove the distinction between the two tenancies, and the words "tenancy at will," used in sec. 2183, include periodic tenancies. *Sutherland v. Drolet,* 154 Wis. 619, 143 N. W. 663. This court is committed to the proposition that a month's notice, in order to terminate the tenancy, must expire at the end of the rent month. *Sutherland v. Drolet, supra.* The end of the rent month in this case was the 24th day of March for the month which began on the 25th day of February. The 25th day of March was the first day of the new period. Was this a sufficient notice?

Having, in *Sutherland v. Drolet,* held that the notice may not terminate the tenancy in the middle of the rent month, it follows logically that it may not terminate it on any day of the rent month except the last. In that respect there is logically no distinction between the first day and the fifteenth day, or any other day. Hence, the tenancy could not be terminated on the 25th day of March. Did the tenant in this case have one month's (calendar month, sub. (10), sec. 4971, Stats.) notice of the landlord's election to terminate the lease prior to the end of the rent month?

What is meant by "one month's notice in writing?" In *Minard v. Burtis,* 83 Wis. 267, 53 N. W. 509, it was said:

"If given the proper number of days before action brought, as contained in the calendar month in which it [notice] was given, as in this case, it was sufficient."

In 1919 there were twenty-eight days in the calendar month of February, the month in which the notice was given. Excluding the 25th day of February (sub. (24), sec. 4971, Stats.), the day on which the notice was served, and including the 24th day of March, the last day of the rent-paying month, the tenant had but twenty-seven days' notice. Therefore the notice lacked one day of being a one month's notice within the meaning of the statute as construed by this court. If the notice had been given one calendar month prior to the last day of the rent month, we do not determine in this case the effect of requiring the tenant, by the terms of the notice, to remove on the first day of a new term.

By the Court.—Judgment reversed, with directions to dismiss the complaint on the merits.

WILL OF O'BRIEN: DUGGAN, Executor, etc., Appellant, vs. O'BRIEN, Guardian, Respondent.

November 17—December 14, 1920.

Wills: Construction: Vesting of title: Legacies to be paid in future: Death of legatee.

1. Where testator, after providing for the payment of specific legacies, debts, and expenses, gave and bequeathed one sixth of the residue of his estate to his grandson, to be paid him with accumulated interest when he should reach the age of thirty, there was a gift *in præsenti,* absolute in form, and the interest of the legatee vested upon the death of testator, unless a contrary intent could clearly be gathered from the will.

2. The law favors an early vesting of title to an interest bequeathed by will; and unless the element of time is made a contingency on which the legatee takes, a mere postponement of time does not prevent his interest from vesting where there is a present absolute gift made by the will, the element of time being annexed to the time of payment and not to the substance of the gift.
3. Where the will provided that in case a son who was a legatee should die leaving children his share should go to them, and that in case any of the children of a deceased son, who were also legatees, should die, their shares would go to their brothers and sisters, the death referred to in each case was one occurring during the lifetime of the testator.

APPEAL from a judgment of the county court of Walworth county: JAY F. LYON, Judge. *Modified and affirmed.*

Action to construe a will. After making certain specific legacies and providing that the rest of his estate should be converted into cash, the testator's will, under clause 8, provided:

"I also give and bequeath one sixth of said sum remaining after the payment of my just debts and funeral expenses and the specific bequests which I have made herein, to my grandson, John Joseph O'Brien, said sum to be paid to my grandson by my said executor hereinafter named when my said grandson shall arrive at the age of thirty years, and in case said sum so given to my grandson, John Joseph O'Brien, must be loaned out by my said executor hereinafter named, then on his arriving at the age of thirty years he shall receive the one-sixth interest given him and all interest accumulating on the same."

Like bequests were made to three other grandchildren, naming them, under clauses 9, 10, and 11 of the will, and a bequest of one sixth was made to the executor under clause 6 in trust for testator's son Edmund, to be paid to him in such sums and at such times as the executor deemed proper. The twelfth clause of the will provided that in case my said son Edmund O'Brien "should die leaving children, then the share which I have given him shall go to his children share and share alike, and in case my said son should die leaving

no child or children, then the share which I have given him shall go to the children of my son Michael O'Brien share and share alike." The thirteenth clause read: "In case any of the children of Michael O'Brien should die without leaving any child or children, then the share which I have given him or her shall go to the surviving children of Michael O'Brien share and share alike."

The will was executed October 24, 1914, and in November, 1916, the testator, Patrick O'Brien, a widower, died at the age of eighty-one years leaving him surviving his daughter Katherine Rainey, his son Edmund O'Brien, a grandson and granddaughter, William Mooney and Mary Mooney, children of his deceased daughter; John Joseph, aged seventeen years; Mary, aged fifteen years; Daniel, aged ten years; and Robert, aged eight years, children of his deceased son Michael O'Brien.

The county court held that the eighth, ninth, tenth, and eleventh clauses of the will gave to the legatees therein named a present absolute and vested one-sixth interest of the remaining net estate, that the death referred to in clause 13 was one occurring in the lifetime of the testator, and that the O'Brien grandchildren alive at the time the testator died took a vested interest in any remainder there might be in the one-sixth set apart in trust for Edmund O'Brien. From a judgment entered accordingly the executor appealed.

For the appellant there was a brief by *Edward Morrissey* of Delavan and *Curkeet & Lewis* of Madison, and oral argument by *William R. Curkeet.*

For the respondent there was a brief by *E. L. von Suessmilch* and *C. J. Sumner*, both of Delavan, attorneys, and *Simmons & Walker* of Racine, of counsel; and the cause was argued orally by *Mr. John B. Simmons* and *Mr. Sumner.*

VINJE, J. Speaking of the remainder of his estate after the specific legacies and debts and expenses have been paid,

the testator says: "I give and bequeath one sixth of said sum . . . to my grandson John Joseph O'Brien," to be paid to him with accumulated interest when he shall arrive at the age of thirty years. We have here a gift *in præsenti*, absolute in form, with no restriction except a postponement of the time of payment. In such case the interest of the legatee vests upon the death of the testator unless a contrary intent can clearly be gathered from the will. *Scott v. West*, 63 Wis. 529, 24 N. W. 161, 25 N. W. 18; *West v. Andrews*, 166 Wis. 509, 166 N. W. 31. The law favors an early vesting of title. *Moran's Will*, 118 Wis. 177, 96 N. W. 367; *Will of Owens*, 164 Wis. 260, 159 N. W. 906; *West v. Andrews*, 166 Wis. 509, 166 N. W. 31. And unless the element of time is made a contingency upon which the legatee takes, a mere postponement of time does not prevent his interest from vesting where there is a present absolute gift, as there is here. In such case the element of time is held annexed to the time of payment and not to the substance of the gift. *Patton v. Ludington*, 103 Wis. 629, 79 N. W. 1073; *Ohse v. Miller*, 137 Wis. 474, 119 N. W. 93. We perceive no intention in the will or circumstances of the testator or legatees to negative an intent to vest the legacy upon the death of the testator.

So, too, in consonance with such construction, it follows that the death mentioned in paragraph 13 refers to a death occurring in the lifetime of the testator. It is not so strange that he should consider the possibility that he might survive some of his grandchildren as it is that he should consider the possibility that the bequest to some of them might not need investment, though not to be paid them till they arrive at the age of thirty years, for he says: "And in case said sum so given my grandchildren . . . must be loaned out by my said executor." The youngest grandchild was only six years old at the time the will was made, and the testator was then seventy-nine years of age.

The death referred to in paragraph 12 must also be construed to refer to a death in the lifetime of the testator. The

contingent bequest to the child or children of Edmund or to the children of Michael is of the whole sum left to Edmund, not to any part thereof, as the county court found. It is manifest that if the testator referred to a death of Edmund after his own decease, he would have to consider that only a portion of the trust fund might be left. But he does not speak of a portion but of the whole thereof, showing that it was a death in his own lifetime he had in mind when the whole trust fund to Edmund would be left intact.

If upon the death of Edmund there should be any portion of his trust legacy left, it would have to be disposed of as the intestate property of the testator. To this extent the judgment of the county court is modified and as so modified is affirmed, with costs to the respondent to be paid out of the estate.

By the Court.—Ordered accordingly.

ESCHWEILER, J., dissents.

WEBB, Appellant, vs. CALL PUBLISHING COMPANY and another, Respondents.

November 17—December 14, 1920.

Libel and slander: Retraction as affecting actual damages: New trial: Excessive damages: Appeal: Part of order not appealed from.

1. The determination of the damages sustained by plaintiff by reason of the printing of a libelous article in a newspaper is peculiarly a question for the jury, and the trial court cannot set aside the verdict on the ground that the damages awarded by the jury were excessive unless they were so excessive as to create the belief that the jury had been misled by passion, prejudice, or ignorance.
2. A verdict awarding $1,000 as actual damages for the publication of a newspaper article charging that a young man whose occupation called for character, integrity, and trustworthiness was a forger, is not so excessive as to indicate that the jury was moved by passion, prejudice, or ignorance.

3. Where the plaintiff made no claim for exemplary damages, evidence that defendant, shortly after publishing the libelous article, published a retraction thereof which it gave the same circulation as the libelous article, is material as showing that the damage to plaintiff was not as great as if the libel had not been retracted.
4. Sec. 4256*a*, Stats., making a retraction published within a reasonable time a defense against any imputation of malice and against the recovery of any damages except actual damages, does not imply that evidence of such retraction is inadmissible in mitigation of actual damages.
5. Where the defendant was awarded a new trial on condition that it pay the costs of the first trial, and on plaintiff's appeal the order was affirmed on a ground which would not require the defendant to pay costs, that part of the order relating to costs, not having been appealed from by the defendant, will not be disturbed.

APPEAL from an order of the circuit court for Racine county: E. B. BELDEN, Circuit Judge. *Affirmed.*

Libel. The plaintiff in this action is a young man twenty-two years of age. He was born and raised in Rankin county, Mississippi, has a high-school education, and is the son of respectable well-to-do parents. He came to Racine sometime during the forepart of 1918 and secured employment in the factories. For a considerable length of time he lived with one William Gause, in whose household he was considered almost a member of the family, and was introduced by them to their circle of friends. While living with them he became acquainted with a number of people and began to form friendships and enlarge his acquaintanceship. In the spring of 1919 he obtained a position as salesman with the Ever-Grip Manufacturing Company at Peoria, Illinois, and while on the road for them he received a letter from a friend at Racine stating that the police were inquiring for him. On or about the 19th day of June, 1919, he came back to Racine to see what the trouble was. At police headquarters he was informed that he was wanted at Watseka, Illinois, on the charge of forgery. He was taken into custody, confined in jail for a couple of days, and then taken

to Watseka, Illinois, where he was released because not the man wanted by the authorities.

The defendant *Call Publishing Company* was at the time in question the proprietor and publisher of the Racine Times-Call, a daily newspaper which had a circulation of 6,500 copies in the city and county of Racine and elsewhere in the state of Wisconsin and throughout the United States. The defendant *Walter S. Goodland* was the editor and manager thereof. On the 18th day of June, 1919, the said newspaper published the following libelous article concerning the plaintiff:

"LONG-HUNTED FORGER GIVES HIMSELF UP."

"*Forest Webb,* wanted at Watseka, Ill., on a forgery charge, walked into the police station this morning and gave himself up.

"The police have been searching for *Webb* for over a year. He formerly lived on De Koven avenue, and worked in a local automobile factory. When he left here he went to Watseka, Ill., where he stopped at the most exclusive hotels under the name of Eddie Ryan.

"It is claimed that he passed several worthless checks on hotel-keepers in that city.

"The sheriff of Iroquois county telephoned to Racine to be on the lookout for the man. Detectives watched his boarding place, but it was not until today, when he walked into the station, that they saw anything of him."

Just before returning to Racine plaintiff resigned his position with the Ever-Grip Company and did not apply for reinstatement therein. Upon his return from Illinois he secured work in a factory at Racine.

The defendants admitted the publication of the article; disavowed any intention to defame and injure the plaintiff in his good name and reputation; denied that the article was maliciously composed, printed, or published; that the article appeared simply as a news item and was brought in by one of its news-gatherers, and was inserted and appeared in said paper without having been submitted to or passed upon or

signed prior to its publication by the defendant *Goodland;* that an honest mistake was made in the publishing of said article; that on the 11th day of July, 1919, a retraction was published in said newspaper in words and figures as follows:

"LONG-HUNTED FORGER GIVES HIMSELF UP."

"*Forest Webb,* wanted at Watseka, Ill., on a forgery charge, walked into the police station this morning and gave himself up.

"The police have been searching for Webb for over a year. He formerly lived on De Koven avenue, and worked in a local automobile factory. When he left here he went to Watseka, Ill., where he stopped at the most exclusive hotels under the name of Eddie Ryan.

"It is claimed that he passed several worthless checks on hotel-keepers in that city.

"The sheriff of Iroquois county telephoned to Racine to be on the lookout for the man. Detectives watched his boarding place, but it was not until today, when he walked into the station, that they saw anything of him.

"The Times-Call desires to fully retract any charge or implication of charge of forgery or any other wrong act contained in the above heading and any text matter following the heading.

"The attention of the Times-Call having just been called to this article, investigation shows that the charges against *Mr. Webb* have not been substantiated."

The case was tried before a jury and a general verdict assessing plaintiff's damages at $1,000 was returned. The defendants moved the court to set aside the verdict and grant a new trial, among other reasons because the court erred in refusing to receive evidence offered by the defendants on the trial and because the damages were excessive. In deciding this motion the court filed a decision in the nature of an opinion in which he held that the damages were excessive, and entered an order that the plaintiff have the option of remitting all in excess of $500 within fifteen days after the entry of the order, with the condition that the defendants pay the costs of trial, and that if the plaintiff does

not accept such option the defendants have the option of paying to the plaintiff $600 and the costs of trial. Neither party accepted the option, and thereafter, on the 5th day of April, 1920, a new trial was ordered upon payment by the defendants of the costs of the trial of this action. From this order plaintiff appealed.

For the appellant there was a brief signed by *Storms, Foley & Beck,* attorneys, and *Jerome J. Foley,* of counsel, all of Racine; and the cause was argued orally by *Jerome J. Foley.*

For the respondents there was a brief by *E. E. Gittings,* attorney, and *Wallace Ingalls,* of counsel, both of Racine; and the cause was argued orally by *Mr. Ingalls.*

OWEN, J. The court ordered a new trial because the damages were excessive. The determination of the damages sustained by the plaintiff by reason of the printing of the libelous article was peculiarly a question for the jury. The court was not at liberty to set aside the verdict on the ground that the damages, as determined therein, were excessive unless it can be said they were so excessive as to create the belief that the jury had been misled either by passion, prejudice, or ignorance. *Donovan v. C. & N. W. R. Co.* 93 Wis. 373, 67 N. W. 721; *Flannigan v. Stauss,* 131 Wis. 94, 111 N. W. 216. We are unable to agree with the trial court that the verdict in this case indicates passion, prejudice, or ignorance on the part of the jury. The article was a most serious reflection on plaintiff's character. No more serious charge can be lodged against a young man just starting out in life as plaintiff was, especially in view of the position he then held. It constituted a charge most serious to a young man seeking employment calling for character, integrity, fidelity, and trustworthiness. The jury were justified in finding that substantial damages to plaintiff followed as a result of the publication of the article, and we do not think the court can say as a matter of law that five or

six hundred dollars marks the limit of that damage. We do not think the verdict of the jury at all unreasonable, and we feel that their verdict for $1,000 was entirely warranted under the facts and circumstances of the case. While we do not think a new trial should have been granted for the reason assigned by the trial court, we have concluded that it was properly granted for another reason.

The court excluded evidence of the publication of the retraction. This was done because plaintiff waived all claim for punitory damages, and the court seemed to be of the view that the retraction was admissible only in mitigation of that class of damages. The defendants argue that it is admissible as bearing upon the actual damages resulting to the plaintiff from the misconduct of the defendants. It is argued that the plaintiff should recover no more than his actual damages, and that the amount of damages resulting from the publication of the libel must have been reduced by the retraction thereafter published. We do not see how this logic can be assailed. Some who read the original article must have read the retraction and it must have had an influence in repairing the damage resulting from the publication of the first article. As the plaintiff was entitled to recover only for damages actually sustained by him by reason of defendants' misconduct, the efforts made by the defendants to repair the damage done should have been placed before the jury for their consideration in conjunction with the publication of the original article and all other facts and circumstances in the case.

The court was possibly misled by the provisions of sec. 4256*a*, Stats. That provides that a retraction published within a reasonable time may be introduced upon the trial of any such action as a sufficient defense against any imputation of malice and against the recovery of any damages except actual damages. By virtue of the provisions of that section, a retraction seasonably made operates as a complete defense against the recovery of exemplary damages.

It does not necessarily follow, however, that it is not admissible as bearing upon the question of actual damages. With reference to that class of damages the statute is silent. The question of the admissibility of a retraction for the purpose of enabling the jury to determine the actual damages is therefore to be governed by the ordinary rules of law.

We find it stated as a general proposition in many cases that a retraction is admissible for the purpose of mitigating damages, and that is the rule laid down by Newell in his work on Slander & Libel (3d ed.) pp. 1087, 1088. In nearly all the cases where that proposition has been laid down, however, the question of punitory damages was involved, and the question whether the retraction is admissible for the purpose of mitigating actual damages was not discussed. In 17 Ruling Case Law, 448, it is said: "Since evidence of retraction is admitted in mitigation of damages on the theory that it tends to negative the existence of actual malice, it follows that such evidence of retraction can be received in mitigation of exemplary damages only." We have examined the authorities cited in support of that proposition of law. In our judgment they do not establish the principle. The principal case cited in support of that proposition is *Clementson v. Minnesota Tribune Co.* 45 Minn. 303, 47 N. W. 781. In that case plaintiff claimed actual or special damages, that is, damages pecuniary in their nature, and also general damages, that is, damages not pecuniary in their nature, such as to reputation, etc. The defendant interposed a general demurrer to the complaint that it did not state a cause of action, the ground of objection being that it did not allege the service before suit of notice on the publisher of the newspaper specifying the statements in the libelous article alleged to be false and defamatory. The decision simply held that the notice was not necessary in an action to recover special damages, and that as to the special-damage feature the complaint stated a cause

of action. The decision was based entirely upon a construction of the Minnesota statute, and cannot be regarded as authority for the general proposition stated in 17 Ruling Case Law, above quoted.

In Massachusetts exemplary damages are not recoverable in an action for libel. Only actual damage may be recovered. In that state it is held that a retraction is admissible as bearing upon the question of actual damages. *Ellis v. Brockton Pub. Co.* 198 Mass. 538, 84 N. E. 1018. In that case it was said: "The publication of a retraction, complete in character and conspicuous in position, might be found to have a material effect in diminishing the mischief caused by the libel, and thus substantially reduce the damages sustained by the person libeled." That appeals to us as good sense. Where a newspaper publishes a libelous article concerning an individual and within a reasonable time thereafter publishes a full and complete retraction, the latter article must in some degree neutralize the damaging effect of the first article; and where the amount of damages which the plaintiff has sustained by reason of defendant's misconduct is involved, the jury is entitled to have before it not only the original article which caused the damage, but the subsequent retraction as well, so that it may form an intelligent opinion as to the net damage plaintiff has sustained.

The trial court excluded evidence of the retraction, and we think this was error for which a new trial should be granted. While defendants should not be required to pay costs in order to secure a new trial for this reason, they have not appealed from that part of the order, and, consequently, we cannot disturb it. It follows that the order appealed from should be affirmed.

By the Court.—Order affirmed.

WENDORF, by guardian *ad litem*, Appellant, vs. DIRECTOR GENERAL OF RAILROADS, Respondent.

November 17—December 14, 1920.

Railroads: Negligence: Licensees: Child playing on cars: Absence of cattle-guards: Standing train as attractive nuisance.

1. A boy nine years old, traveling with companions on a railroad right of way while gathering flowers, at a place used by pedestrians as a foot-path to the knowledge of the railroad company, is a licensee with the right to travel over the right of way in the manner in which it is used by pedestrians; but when he diverts from his travel and mounts cars of a standing freight train to engage in play he becomes a trespasser, to whom the company owes no active duty unless its employees have knowledge of his presence and perilous position on the train; and if he is injured when the train is started in the usual manner without such knowledge the company is not liable therefor. *Carmer v. C., St. P., M. & O. R. Co.* 95 Wis. 513, distinguished.
2. Where a boy passed onto the right of way of a railroad, climbed onto freight cars, and while playing was injured when the train started, failure of the company to provide cattle-guards, as required by sec. 1810, Stats., was not the proximate cause of his injuries.
3. A train of railroad cars cannot be classed with turntables or like machinery as alluring and attractive to children so as to require careful guarding against danger to them.

APPEAL from a judgment of the circuit court for Milwaukee county: WALTER SCHINZ, Circuit Judge. *Affirmed.*

This action was brought by the guardian *ad litem* of plaintiff to recover damages for personal injuries sustained by plaintiff, which injuries, it is claimed, were due to negligence of the defendant. The plaintiff, a boy nine years of age, was thrown from a freight car upon which he had climbed while the car was not in motion, the accident occurring when the car was put in motion. Plaintiff alleges that the car was started with such violence that he was thrown down and under the car and had his leg cut off by one of the wheels; that the fencing and cattle-guard statute

was violated by defendant, there being no cattle-guard at the place where the plaintiff came from the highway upon the railroad track where he was injured; that the place where he entered and where he was injured was a way licensed for a foot-path; that ordinary care was not used by the defendant, before putting the car in motion, to discover whether the plaintiff was in a position of peril. The answer of defendant puts in issue the allegations of the complaint.

At the close of the evidence on both sides the court directed a verdict in favor of defendant. Judgment was entered in favor of defendant against plaintiff, dismissing the action upon the merits. This is an appeal from such judgment.

William A. Schroeder and *Horace B. Walmsley,* both of Milwaukee, for the appellant.

For the respondent there was a brief by *Henry J. Killilea* and *Rodger M. Trump,* both of Milwaukee, and oral argument by *Mr. Trump.*

SIEBECKER, C. J. The trial court held that it is undisputably established by the evidence that plaintiff at the time of injury was a trespasser on defendant's freight train and that defendant was not guilty of any want of ordinary care proximately causing plaintiff's injury. There is no dispute but that the railroad right of way at the place in controversy was used by a large number of pedestrians from Hopkins road to go to and from the manufacturing plants north of this road, and that plaintiff and his companions at the time in question entered upon the railroad right of way at Hopkins road to gather flowers on the right of way and in adjacent fields. The place of accident is in the country and there are no residences located in the immediate vicinity. In view of all the conditions it must be held that when plaintiff used the right of way at the time in question as a footway he was traveling thereon as a licensee. This gave him the privilege of one traveling over it in the way it was being used by pedestrians to the knowledge of the railroad company, but

as such a licensee he had no right to go onto trains on the tracks for play, nor to expose himself to the dangers of passing trains. It is manifest that plaintiff at the time of the accident was not using this right of way in the manner pedestrians did when using it as a foot-path. He diverted from his travel with his companions to mount the cars of a freight train which was making a short stop in its course northward, to engage in play on the cars as brakeman. It is obvious that when they mounted the freight cars to engage in play they were not in the relation of licensees to the railroad company, but were trespassers. Such act of plaintiff and his companions was a wrong of an aggravated nature and most dangerous, and the railroad company owed them no active duty to protect them unless its agents and servants had knowledge of their presence on the train and of their perilous position. *Anderson v. C., St. P., M. & O. R. Co.* 87 Wis. 195, 58 N. W. 79. Counsel for plaintiff stresses the claim that the facts of the instant case bring it within the authority of *Carmer v. C., St. P., M. & O. R. Co.* 95 Wis. 513, 70 N. W. 560. It has frequently been held that when railway tracks are used with the acquiescence of the company by pedestrians as a crossing or foot-path the pedestrians are licensees and it becomes the duty of the railway company to keep a reasonably vigilant lookout to prevent accidents and injuries to such licensees, but it does not owe this measure of duty to trespassers. The *Carmer Case* is clearly one where the child used the railroad grounds as a licensee and was injured while crossing between cars of a train which stood an hour or more on a sidetrack at the village station. Such crossing was being used by adults and school children in their course of travel from one side of the tracks to the other in the village, to the knowledge and with the acquiescence of the railway company. Under the facts and circumstances and the surrounding conditions shown in that case, this court held that the injured child there was a licensee and that the company owed him the duty of exercising active vigilance to protect him from injury.

These facts and conditions manifestly distinguish that case from the one before us. The evidence adduced upon the trial fails to disclose anything tending to show that the trainmen were aware that plaintiff and his companions were present on the cars or on the right of way. It appears that the train was started in the usual manner at the required time. It is considered that the evidence wholly fails to show any negligence by defendant's agents and servants which proximately caused plaintiff's injuries.

The contention that defendant is liable for its default in not having built a cattle-guard at the intersection of its right of way and Hopkins road, upon the ground that the accident to plaintiff "was occasioned in whole or in part" by the absence of such cattle-guard, under the provisions of sec. 1810, Stats., is not sustained. The observation in a similar case (*Vaillant v. C. & N. W. R. Co.* 163 Wis. 548, 158 N. W. 311) is applicable to the facts in this case:

"The claim that the presence of a legal fence [here a cattle-guard] on the right of way would have intercepted the boy in the progress of his course and have prevented him from catching the moving train and thus he would have avoided the injury, is based on inferences highly speculative, uncertain, and purely conjectural. It cannot be said, in the light of common experience, that such a fence [cattle-guard] would have intercepted or diverted the boy in his undertaking to reach the . . . train."

It is clear that the absence of a cattle-guard at the margin of Hopkins road and the railroad right of way did not cause, nor was it the means of producing, plaintiff's injuries. We do not consider that a train of railroad cars on a track can be classed with turntables and like machinery as alluring and attractive to children, so as to put the burden on railroad companies to carefully guard them against danger to small children. *St. Louis S. W. R. Co. v. Davis* (Tex.) 110 S. W. 939, and cases cited on p. 945.

By the Court.—Judgment affirmed.

FISHER, Plaintiff, vs. MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Appellant, and RUMPH, imp., Respondent.

November 18—December 14, 1920.

Negligence: Injury augmented by malpractice of physician: Liability of physician: Joint tortfeasors: Contribution: Subrogation: Order making physician party to action: Discretion of court: Review.

1. Where the plaintiff sustained a fracture of her wrist because of the negligence of the defendant railway company, she may recover her entire damages from such defendant even though they may have been caused in part by the negligent treatment administered by a physician employed by her.
2. The railway company and the physician are not joint tortfeasors, and the liability of the physician does not arise by reason of his liability for contribution in the event of recovery against the company; but the railway company, on being compelled to pay damages due to the negligence of the physician, is subrogated to the rights the plaintiff had against him.
3. Under sec. 2610, Stats., providing that when defendant will have a right of action against a third person for the amount of the recovery against him the third person may be made a party defendant, the railway company is entitled to have the physician made a party defendant, notwithstanding the general rule that there can be no right of action by the party subrogated to another's rights until the judgment has been paid.
4. Said sec. 2610 applies to tort actions as well as actions on contract, though the trial court, in the exercise of its discretion, should, when called upon, recognize the established distinction between the rights of parties in the two classes of actions.
5. Under said sec. 2610 the circuit court, in its discretion, may make the physician a party to an action for the injury, though the original defendant would have a right of action against the physician for only a part of the recovery.
6. Although a case is within the provisions of said sec. 2610, the circuit court may, in the exercise of its discretion, refuse to implead a third person who is liable to defendant; but in this case, the court having exercised its discretion and ordered the physician to be made a party defendant, it could not review such order on demurrer or motion to dismiss a cross-complaint against the physician.
7. An order bringing in a party defendant is not appealable, and can only be reviewed on appeal from final judgment.

APPEAL from an order of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Reversed.*

Personal injury. Demurrer to cross-complaint. The plaintiff claimed to have been injured on the 23d day of September, 1917, by being thrown from one of the cars of the *Milwaukee Electric Railway & Light Company,* hereafter called the *Light Company,* through the negligent act of the *Light Company.* It is the contention of the *Light Company* that the damages sustained by the plaintiff were due in part to the negligent treatment of plaintiff's injuries by the defendant *Rumph.* After the commencement of the action the *Light Company,* upon a verified cross-complaint and affidavit, procured an order of the circuit court for Milwaukee county requiring *Rumph* to show cause why he should not be made a party defendant. In its answer the *Light Company* denied that it was negligent or that the injuries that the plaintiff sustained were received as the result of the defendant's negligence. In its cross-complaint it alleges:

"That the injury sustained by the plaintiff was a Colles fracture of the left wrist, which is easily remediable by ordinary surgical treatment.

"That, although the defendant offered services of competent physicians, the plaintiff rejected the same and secured the services of a physician and surgeon, one *Dr. Charles L. Rumph,* whose residence is 1213 Milwaukee avenue, South Milwaukee, Wisconsin; that said *Dr. Rumph* was at said time, and is, a duly licensed and practicing physician and surgeon; that said *Dr. Rumph* so negligently and carelessly treated the plaintiff's said injury that he caused a partial loss of the use of plaintiff's left hand and forearm, and produced, by failing to use ordinary surgical skill and by improper bandaging of said fracture, an ischaemic paralysis of plaintiff's hand and forearm; that had said *Dr. Rumph* used ordinary surgical skill said Colles fracture would have been completely cured within a short time and no disability whatever would have resulted therefrom."

The *Light Company* then asks that, if recovery be had

against it for the injuries due to the alleged improper treatment of *Rumph,* it be permitted to recover from *Rumph* such damages as were in excess of those which would have followed the plaintiff's injury had she been treated with ordinary surgical skill. The plaintiff's attorney filed an affidavit in which he stated he made no objection to *Rumph* being made a party and re-asserted the plaintiff's right to recover the entire damages from the defendant company. Upon the hearing, by order dated September 28, 1918, *Rumph* was made a party defendant "for the purpose of responding to the cross-complaint of the defendant." The plaintiff was directed, at the expense of the *Light Company,* to deliver to the defendant an amended summons, which amended summons was to be served by the *Light Company,* with the proposed cross-complaint, upon *Charles L. Rumph.* Notice of entry of order was served October 2, 1918. No appeal was taken by any party from this order. On the 18th day of October, 1918, the defendant *Rumph* demurred to the cross-complaint "upon the ground that it does not state facts sufficient to constitute a cause of action." On the 21st day of April, 1920, the circuit court made an order, first, sustaining the demurrer to the cross-complaint; second, ordering that the cross-complaint be dismissed and that *Rumph* be dismissed as a party defendant to the action; and third, that the *Light Company* have twenty days from date in which to file an amended pleading upon the payment of $10 to the said defendant *Rumph.* From this order the *Light Company* appeals.

For the appellant there were briefs by *Van Dyke, Shaw, Muskat & Van Dyke* of Milwaukee, and oral argument by *Carl Muskat.*

For the respondent the cause was submitted on the brief of *Lines, Spooner & Quarles* of Milwaukee.

ROSENBERRY, J. The order appealed from appears to be inconsistent upon its face. If the cross-complaint be dis-

missed and *Rumph* be dismissed as a party, the *Light Company* could not plead over as provided for in the third provision of the order.

It is the contention of the *Light Company* that it has a remedy over against the defendant *Rumph* under the principles of subrogation and the provisions of secs. 2610 and 2656*a*, Stats. Under the facts that appear from the pleadings, it is plain that the plaintiff may recover her entire damages from the *Light Company*, even though they may have been caused in part by the negligent treatment given the plaintiff by the defendant *Rumph*. *Selleck v. Janesville*, 100 Wis. 157, 75 N. W. 975. It is contended on behalf of the defendant *Rumph* that the principles applicable to suits against joint tortfeasors apply here. The argument in support of this contention is unsound. It appears that the liability of the defendant *Rumph*, if any there be, is due to his want of care and skill as a surgeon, while the liability against the *Light Company* is due, if any there be, to its failure to exercise ordinary care. They are not in any sense of the term joint tortfeasors. The liability of the defendant *Rumph* to the *Light Company* does not arise by reason of his liability for contribution in the event of a recovery against the *Light Company*. His liability is a liability over, and arises in favor of the *Light Company* by reason of the fact that the *Light Company* is compelled to pay damages which are primarily due to the alleged negligence of the defendant *Rumph* and for which the plaintiff might have maintained an action against the defendant *Rumph*. The *Light Company*, being compelled to pay these damages, is subrogated to the plaintiff's rights against *Rumph*, as she may not twice recover compensation for the same injury. It is contended on behalf of the defendant *Rumph* that there can be no right of action in favor of the *Light Company* against the defendant *Rumph* until the judgment has been paid, and this, no doubt, is the ordinary rule.

Defiance M. Works v. Gill, 170 Wis. 477, 175 N. W. 940. This brings us to a consideration of sec. 2610, Stats.:

"A defendant who shows by affidavit that if he be held liable in the action he will have a right of action against a third person not a party to the action for the amount of the recovery against him, may, upon due notice to such person and to the opposing party, apply to the court for an order making such third person a party defendant in order that the rights of all parties may be finally settled in one action, and the court may in its discretion make such order. This section shall be liberally construed in order that, so far as practicable, all closely related contentions may be disposed of in one action, even though in the strict sense there be two controversies, provided the contentions relate to the same general subject and separate actions would subject either of the parties to the danger of double liability or serious hardship."

This contention of the defendant *Rumph* is answered by *Brovan v. Kyle,* 166 Wis. 347, 165 N. W. 382, where it was held that no argument was needed to show that a surety on a guardian's bond, if held liable thereon, is *pro tanto* subrogated to the rights of his ward and may follow the property of the ward's estate into whosesoever hands it may wrongfully come, and is entitled, under such circumstances, to have a party liable over to him made a party defendant under the provisions of sec. 2610, even though the judgment had neither been entered nor paid. It is true that *Brovan v. Kyle, supra,* was an action upon a contract and in that respect differs from the present action. But sec. 2610 applies as well to tort actions as to actions upon contract, although the trial court should, in the exercise of its discretion, when called upon, recognize the established distinction between the rights of parties in the two classes of actions. *Bakula v. Schwab,* 167 Wis. 546, 168 N. W. 378; *Humboldt v. Schoen,* 168 Wis. 414, 170 N. W. 250; *Schmuhl v. Milwaukee E. R. & L. Co.* 156 Wis. 585, 146 N. W. 787.

It is further argued that, under the provisions of sec. 2610, unless a defendant has a right of action over against a third person "for the amount of the recovery against him," the statute does not authorize such third person to be made a party to the action. In this case, if the plaintiff prevails, the *Light Company* will not have a cause of action over against the defendant *Rumph* for the full amount of the plaintiff's recovery against it, for, under such circumstances, a part of the injuries are admittedly due to the negligence of the *Light Company*. It can at most have a right of action over against the defendant *Rumph,* upon principles of subrogation, for only a part of the recovery. In view of the fact that it is provided that the section shall be liberally construed in order that all closely related contentions may be disposed of in one action, even though there be two controversies, we are of the opinion that sec. 2610 confers authority upon the circuit court for Milwaukee county, in the exercise of its discretion, to make *Rumph* a party defendant in this action. We see no reason why it should not be so construed. The contentions relate to the same general subject, and it is conceivable that, although the plaintiff recover against the *Light Company* for damages due to the negligence of the defendant *Rumph,* a second jury might find against it upon that issue, and the *Light Company* therefore be compelled to pay damages, as between it and *Rumph,* not justly chargeable to it, although legally liable therefor to the plaintiff.

It is further contended on behalf of the defendant *Rumph* that the circuit court may, in the exercise of its discretion, refuse, in a case within the provisions of sec. 2610, to make a third person a party defendant. *Ertel v. Milwaukee E. R. & L. Co.* 164 Wis. 380, 160 N. W. 263. This is undoubtedly the law. But the question of whether or not the circuit court should, in the exercise of its discretion, make *Rumph* a party defendant, was settled by the order of September 28, 1918. The court having once exercised its discretion, a review of that order by the circuit court for Milwaukee

county cannot be had by moving to dismiss the cross-complaint as to *Rumph*. Whether or not, if motion upon proper showing therefor had been made seasonably by the defendant *Rumph*, the circuit court might have modified or corrected its order, is not determined here. There has been no motion at any time to modify or correct the order of September 18, 1918, and certainly a demurrer to the cross-complaint served pursuant to that order does not afford a basis upon which the circuit court may proceed to review its prior order. There having been no seasonable motion to review the order, and the order not being appealable (*Schmuhl v. Milwaukee E. R. & L. Co., supra*), the action of the circuit court making *Rumph* a party can only be reviewed on appeal from final judgment. *Fred Miller B. Co. v. Knebel*, 168 Wis. 587, 171 N. W. 69.

The circuit court, therefore, erred in dismissing the complaint and dismissing *Rumph* as a party. The cross-complaint states a cause of action in favor of the *Light Company* against *Rumph* under the provisions of sec. 2610, and the demurrer of *Rumph* should have been overruled.

By the Court.—Order reversed, with directions to overrule the demurrer and for further proceedings according to law.

OWEN, J. (*concurring*). I agree that the original action of the court in bringing in *Dr. Charles L. Rumph* as a defendant could not in effect be reviewed and set aside in passing upon a demurrer to the cross-complaint filed by the street railway company against *Rumph*, and that upon this appeal neither the question of the power nor the propriety of the court, in the exercise of its discretion, to order the bringing in of the defendant *Rumph*, is before us for review. I cannot refrain, however, from giving expression to my individual opinion that whether the provisions of sec. 2610 prove a blessing or a nuisance will depend very much upon the wisdom exercised in its administration. In order to

accomplish the beneficent purposes intended by its enactment, its scope was necessarily made quite broad, and the question of whether, in a given case, the power conferred should be exercised was committed to the discretion of the trial court. The purpose of the enactment was to facilitate and expedite the dispatch of litigation and provide for the settling of all closely related questions in one action. It is obvious that this often may be done without imposing additional burden, hardship, or delay upon the original parties to the action, and that under such circumstances the administration of justice is greatly facilitated.

I think the present case forcibly illustrates the fact that the evils resulting from the exercise of the discretion may far outweigh the benefits to be accomplished, and that an unwise exercise of the power conferred can easily bring the statute into disrepute, which will result in its emasculation or repeal, with the consequence of serious loss to the administration of the law. I can see no purpose to be subserved or accomplished in burdening plaintiff's case with this cross-issue between the street railway company and the doctor. The two issues are as foreign to each other as they well could be. The plaintiff is not at all interested in the issue raised by the cross-complaint, and it would not be surprising if its trial should consume much more time than the trial of the main issue between the plaintiff and the street car company. During all the time, however, the plaintiff must be present with her witnesses and she must pay her attorneys for being in attendance, while the issue in which she is not at all interested is being tried out, which may in the end result in a mere moot question, because, unless plaintiff recovers against the street car company, the malpractice of the physician does not become material, and the time of the court and litigants will have been taken up with the trial of a moot issue. Furthermore, the plaintiff is entitled to the honest co-operation of her physician. She is entitled to his honest and unprejudiced testimony concerning her condition. This proceeding makes him an interested party

against her, as, if he is to be called upon to stand a portion of the damages resulting from her present condition, it is to his interest to minimize the damages to which she may be entitled. Then, again, the progress of her entire action is made to depend upon the progress of the cross-issue. The trial of her case has been held up pending this appeal. Many matters growing out of the cross-action may occur from time to time to delay the trial of the case, all to her prejudice, without any compensating results, so far as I can see, in the matter of speeding the administration of justice.

Trial courts should appreciate the responsibility which the statute lays upon them. Whether additional parties shall be brought in is always a matter for the exercise of wise discretion under the circumstances. The power was conferred so that by its exercise the administration of justice may be facilitated and expedited, and whether in a given case the bringing in of new parties will have this effect calls for the serious consideration of the court. Where it will delay, hamper, or burden the plaintiff, it should appear pretty plainly that, in the end, benefits in the nature of general results will outweigh the inconvenience, annoyance, and expense which the bringing in of new parties will impose upon the plaintiff, or the application should be denied.

MOODY, Appellant, vs. MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Respondent.

November 18—December 14, 1920.

Street railways: Collision with automobile: Gross negligence: Contributory negligence: Question for jury: Appeal: Reinstatement of special verdict: Motion for new trial: Disposition of case.

1. In an action for personal injuries, the testimony of the driver of an automobile, which was corroborated by that of a passenger riding in the front seat, that he looked and had a full view some three hundred and thirty feet up a street railway

track but did not see a street car which struck the automobile as it was crossing the tracks, is *held* to make the contributory negligence of the driver and of the plaintiff, who was sitting on the back seat with a curtain partly obstructing her view, a jury question.

2. Where the undisputed facts or the physical situation shows that an approaching car is within plain view of one approaching and about to cross a street railway track, the testimony of one so approaching that he looked but did not see it is not sufficient to take the case to the jury.
3. Direct and positive testimony that the driver of the automobile performed the duty imposed upon him by law in regard to the exercise of due care is sufficient to take the question of his negligence to the jury, unless such testimony is contrary to physical or conceded facts and is thus impeached because of utter improbability or impossibility.
4. Where the driver, who had a much better view than plaintiff, looked and saw no car approaching, the failure of the plaintiff to look, if she did fail to look, did not, as a matter of law, proximately contribute to the accident and injury.
5. Where the driver, while still on the crosswalk, had an unobstructed view for three hundred and thirty feet and saw no street car approaching, he was not negligent as matter of law in proceeding across the track without making further observations.
6. Evidence that a street car forty-two feet long and weighing twenty-four tons was operated on a down grade on a busy street at a high rate of speed does not justify the submission to the jury of the issue of gross negligence.
7. Where the trial court changed certain answers in the special verdict without passing on a motion for a new trial, the supreme court, on reinstating the answers of the jury, will remand the case with instructions to pass on a motion for a new trial.

APPEAL from a judgment of the circuit court for Milwaukee county: JOHN J. GREGORY, Circuit Judge. *Reversed.*

This action was brought to recover damages for personal injuries received March 29, 1918, at the intersection of Chambers and Third streets in the city of Milwaukee, when the automobile in which plaintiff was then riding was struck by defendant's street car. At the time in question plaintiff was riding in a Ford touring car driven by one Pierson. Plaintiff was sitting on the back seat with two

other ladies. The driver and another lady occupied the front seat. There was a small black curtain at the rear, on the left-hand side, but no curtain over the front side. The automobile was proceeding east on Chambers street, and the accident happened at the intersection of that street with Third street, which runs north and south.

The driver of the automobile testified that upon reaching Third street he looked to the north and saw no street car coming. He had a full view of the track for 330 feet and there was no street car approaching within that distance. He proceeded across the street, and before clearing the street-car tracks a south-bound street car coming on the west track struck the left rear wheel of the automobile, threw the occupants of the rear seat therefrom, seriously injuring the plaintiff.

A special verdict was returned by the jury, in which it was found (1) that the street car was being run at a dangerous rate of speed as it approached the point of collision; (2) that the motorman in charge of said street car was guilty of negligence in driving the same; (3) that such negligence was the proximate cause of the collision; (4) that the gong of the street car was sounded as the car approached Chambers street; (5) that there was no want of ordinary care on the part of the driver of the automobile in which plaintiff was riding which proximately contributed to produce the collision; (6) that there was no want of ordinary care on the part of the plaintiff which proximately contributed to produce the collision; and (7) damages $5,000.

The defendant made alternative motions to change the answer to question No. 7 of the special verdict (acquitting the driver of negligence) from No to Yes, to change the answer to question No. 8 (acquitting the plaintiff of contributory negligence) from No to Yes, and for judgment in favor of the defendant under said special verdict as so

changed and amended; for judgment on the uncontradicted evidence notwithstanding the verdict, and in the event that the foregoing motions be denied for a new trial, for fourteen reasons specified. The court granted defendant's motions to change the answers to the above questions from No to Yes, and upon the special verdict as so amended ordered judgment in favor of the defendant. From the judgment so entered plaintiff brings this appeal.

W. A. Hayes and *Henry Mahoney,* both of Milwaukee, for the appellant.

For the respondent there was a brief by *Van Dyke, Shaw, Muskat & Van Dyke,* and oral argument by *Ralph M. Hoyt,* all of Milwaukee.

OWEN, J. The jury by its verdict acquitted the plaintiff as well as the driver of the automobile of contributory negligence. The trial court changed the answers of the jury to the questions of the special verdict eliciting its findings upon those questions, and convicted both the plaintiff and the driver of contributory negligence. It is the claim of the appellant that the state of the evidence made these jury questions, and that the court erred in assuming to find with reference thereto as a matter of law.

It is conceded that it was the duty of the driver of the automobile as well as of the plaintiff to look and listen for approaching cars before attempting to cross the street railway tracks. The driver of the automobile and Rhoda May, who sat in the front seat with him, testified that as they approached Third street he slowed down to a speed of about four miles an hour; that he looked north and then looked south, saw no street car approaching, increased his speed to about six miles an hour, and proceeded on his way across Third street and across the tracks. There is positive and direct testimony, therefore, to the effect that he performed the duty which the law thus imposed upon him. This testimony is sufficient to take the question of the driver's negli-

gence to the jury, unless it is contrary to physical or conceded facts or common knowledge, thus standing impeached because of its demonstrated utter improbability or impossibility. *Samulski v. Menasha P. Co.* 147 Wis. 285, 133 N. W. 142, and cases cited.

Respondent contends that the evidence in the case indisputably shows that if the driver looked when he says he did, the car which struck the automobile was within the range of his vision, and that he cannot be heard to say that he looked, because, upon the undisputed testimony, if he had looked he would have seen the car. This court has said many times that where undisputed facts, or the physical situation, shows that an approaching car is within plain view of one approaching and about to cross a railway track, the testimony of one so approaching that he looked but did not see is not sufficient to take the case to the jury. *Cawley v. La Crosse City R. Co.* 101 Wis. 145, 77 N. W. 179; *Tesch v. Milwaukee E. R. & L. Co.* 108 Wis. 593, 84 N. W. 823; *Schmidt v. Milwaukee E. R. & L. Co.* 158 Wis. 505, 149 N. W. 221; *Meissner v. Southern Wis. R. Co.* 160 Wis. 507, 152 N. W. 291; *Spence v. Milwaukee E. R. & L. Co.* 163 Wis. 120, 157 N. W. 517. In order to invoke this principle, however, it must appear as an uncontrovertible fact that the car was within his range of vision at the time he claimed to have looked, and the question here is whether it can be said as a matter of law that the street car was within his range of vision at the time the driver of the automobile claimed he looked to the north.

A review of the evidence discloses that the location of the car at the time Pierson, the driver of the automobile, claimed to have looked, depends entirely upon the testimony of other witnesses, either directly or inferentially, and so far as their testimony tends to show that the car was within his range of vision it is simply in conflict with the testimony of the driver of the automobile and the witness Rhoda May, who say it was not. We are unable to find anything in the

record of the uncontrovertible nature of physical or conceded facts or common knowledge which is necessary to read the testimony of Pierson and Rhoda May out of the case and justify a court in entirely disregarding it.

The only physical facts we have in the case are distances. We know that the distance from the point of the accident to a certain canopy over the sidewalk up to the north is about 330 feet. We know that the distance which the automobile was required to travel from the time it reached the building line of Third street, when a view could be obtained as far north as this canopy, was forty-two feet. That is all there is in the case in the nature of physical facts. We know that if the driver of the automobile took his observations at just the point of the building line, a street car coming from beyond the canopy would travel eight times the distance covered by the automobile in order to collide with the automobile at the time of the accident, and if the observations were taken when the automobile had passed the building line a distance of six feet, then the street car would be required to travel nine times the distance covered by the automobile in order to reach the point of collision. Now we do not know exactly where the driver of the automobile made his observations. He says he made them while he was on the crosswalk. But as the crosswalk was fourteen feet wide, which amounts to one third of the distance necessary to be traveled by the automobile from the time the driver sitting therein had reached the building line, this does not afford us very definite information as to where he took his observations, as, under the circumstances, a few feet with reference to his location becomes very material.

Neither can it be told from the evidence at just what rate of speed the street car was coming. It is indisputable that it was coming very fast. The motorman admits that at the time of the collision it was going at twenty miles an hour; he admits that when it turned into Third street, a block above the point of collision, it was going between twenty-five

and thirty miles an hour. It is undisputed that from that point to the point of collision the street presents a very decided down-grade. While the rate of speed of the car, as is usual in such cases, is variously estimated by the witnesses, and inferences to be drawn from the testimony furnishing a basis for calculation of the speed are widely variant, it does plainly appear that the car was going at a very high rate of speed. One calculation made by appellant's attorneys, based on evidence in the case, shows that it was going at the rate of fifty-five miles per hour. This calculation, however, is based upon the statement of the motorman given upon the spur of the moment, without much reflection, that the collision took place within a second after he saw the automobile, and his estimate of the distance he was from the automobile at the time he first saw it. This, we agree, is not very satisfactory testimony upon which to base a finding with reference to the speed of the street car; but, nevertheless, it was evidence in the case to be taken into consideration by the jury with all other facts and circumstances bearing upon the question of the rate of speed at which the street car was traveling. There is very satisfactory evidence in the record that the street car was traveling thirty-six miles an hour. This is the evidence of Frank Lutz, who testified that he was going south on Third street in a Dodge automobile at the rate of fifteen to eighteen miles an hour; that the street car passed him about at the canopy going twice as fast as he was going, and that it did not slacken its speed prior to the accident. Similar testimony is given by his brother, William Lutz.

With reference to the speed of the automobile, the driver testifies that as he approached Third street he slowed down to four miles an hour, and that after looking for approaching cars he increased his speed to about six miles an hour, traveling in low speed all the time. Of course the jury had a right to consider that there was nothing accurate in the statement of any witness concerning either the speed of the

automobile or the speed of the street car. It can be figured out to a mathematical certainty that if the automobile proceeded, from the time it reached the building line, at the rate of four miles an hour, a street car coming from beyond the canopy at the rate of thirty-two miles an hour would collide with the automobile at the point of collision, and that if the driver had completed his observation when he had passed the building line by a distance of six feet, a car coming from beyond the canopy at a speed of thirty-six miles an hour would likewise collide with the automobile if it proceeded from there on at the rate of four miles an hour. When we consider that the testimony with reference to the speed of the automobile as well as the car rests in the estimate and judgment of witnesses, probably not very carefully weighed, concerning which there is a wide divergence of opinion, it seems to us that the entire question was one for a jury and one which could not be resolved as a matter of law. The positive testimony of the driver of the automobile that he looked, that he could see the track for a distance of 330 feet, and that there was no street car approaching within that distance, cannot be disregarded under all the facts and circumstances of the case, and the jury was not bound to disbelieve his assertion in this respect.

It is also argued on the part of the respondent that the driver and other occupants of the automobile could have seen further than 330 feet. This appears to be true, in the absence of temporary obstructions of the view, but Pierson's testimony is that there was a moving van in front of the canopy already referred to which obstructed his further view in that direction. Whether this was true or not is also a jury question. We think the court was in error in disturbing the findings of the jury with reference to these two questions.

We have not discussed the negligence of the plaintiff because it seems plain that if the driver looked and saw no car approaching, as his view was much better than that of the

plaintiff, who sat in the rear seat and whose view was necessarily obstructed by a curtain on the side of the automobile, her failure to look, if she did fail to look, cannot be said as a matter of law to have proximately contributed to the accident and injury.

We have given attention to the question of whether it was the duty of the driver of the automobile to look again, as under the testimony the automobile was still on the crosswalk when observations for street cars were completed. It seems plain, however, that when a driver so circumstanced has an unobstructed view for 330 feet and sees no street cars coming, it cannot be said that he is negligent as a matter of law in proceeding across the track without making further observations, and that this feature of his conduct was proper to be considered by the jury as bearing upon the question of his contributory negligence.

The appellant also claims error because the trial court declined to submit to the jury the question of whether the defendant was guilty of gross negligence. In the opinion of the writer, the operation of a car forty-two feet long, weighing about twenty-four tons, on a busy street, on a down grade, at the rate of speed at which the jury had a right to find this car was being operated, justifies a finding of gross negligence. It is conceivable that more dangerous agencies could be turned loose on a street—a ball shot from a cannon, for instance,—but a street car such as the one there and then operated, propelled at the rate of speed it was then going, beyond the power of the operator thereof to check the same perceptibly within any reasonable distance under emergency, is a menace, in my opinion, to the users of the streets, and evinces a wanton disregard for the lives and safety of others. The court, however, is of a contrary view, and considers that the evidence did not justify the submission of the question of defendant's gross negligence to the jury.

As the trial court granted respondent's motion to change

the answers of the jury to these two questions of the special verdict, it did not consider the motion for a new trial. Respondent urges that if the action of the trial court in changing the answers contained in the special verdict of the jury be reversed, the case should be sent back with instructions to the trial court to pass upon the motion for a new trial. This request seems to be proper and in accordance with the established practice of this court. *Stanley S. E. L. Cong. v. La Crosse S. R. & C. Co.* 148 Wis. 261, 134 N. W. 351; *Smith v. Winnebago Realty Co.* 153 Wis. 469, 475, 140 N. W. 327.

By the Court.—Judgment reversed, and cause remanded with directions to reinstate the answers of the jury to the seventh and eighth questions of the special verdict, and for further proceedings as indicated in this opinion.

MAAS and others, Executors, Appellants, and others, Respondents, vs. HESSE and others, Appellants, and others, Respondents.

November 19—December 14, 1920.

Bills and notes: Agreement to assume mortgage: Extension of time of payment: Consideration: Trust companies: Deposit of securities: State treasurer as holder for value: Mortgages: Assignment not of record: Effect.

1. Where a mortgagor conveyed the mortgaged lands to W., but the deed was not signed by his wife, and later the wife, having nothing but an inchoate right of dower, quitclaimed the lands to C., who gave a warranty deed to H. subject to the mortgage, which H. assumed and agreed to pay, and H. and the mortgagee thereupon executed an agreement extending the mortgage, both the agreement to assume and the agreement to extend were without consideration and void.
2. Under sec. 2024—77*j*, Stats., requiring trust companies to deposit securities with the state treasurer, the latter, as respects equities of third parties, is a holder for value in good faith of a mortgage deposited with him in the regular course of

his official business in exchange for other securities of equal value.

3. Where the state treasurer accepted, as security in a trust company's deposit of securities, a duly recorded first mortgage, its priority in his hands as a first recorded lien was not lost because, subsequent to the date of the first mortgage, the trust company had accepted a third mortgage (which purported to be a first mortgage) on the same property and sold the notes thereby secured to its clients without revealing the fact of its prior mortgage; the noteholders having taken no steps to have the third mortgage declared prior to the first mortgage or to prevent its transfer, and not procuring or recording assignments of the third mortgage. *Butler v. Bank of Mazeppa*, 94 Wis. 351, distinguished.

4. The state treasurer is not chargeable with secret equities which may exist against the trust company, although the mortgage note was past due at the date of deposit of the securities.

APPEAL from a judgment of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Modified and affirmed.*

Suit to foreclose four successive mortgages upon the same piece of property located in the city of Milwaukee. The trial court adjudged that the first mortgage, now held by the state treasurer under the provisions of sec. 2024—77*j*, Stats., was the first lien to the extent of its principal sum. The appeal is by parties having interests under the second and third mortgages and who claim priority over the first mortgage. The only question presented is that of the priority of appellants' interests in the third mortgage over the state treasurer's interest in the first mortgage. The statement of facts may be restricted to those which bear upon this issue.

In 1893 Robert Harper, then owner of the premises, executed the first note and mortgage for $10,000 to an insurance company for which the firm of Nath. Pereles & Sons acted as agent. The note was payable in five years. The mortgage contained a covenant to pay the principal sum with interest, and to pay the taxes. The mortgage was placed on record.

Title to the premises was conveyed to *William W. Harper* in 1899 subject to the mortgage, which he agreed to pay. Thereafter, in 1899, *William W. Harper* and wife executed the second notes and mortgage to the *Citizens' Savings & Trust Company*, a trust company bank then doing business in Milwaukee, and the mortgage was placed on record. Some of these notes are now held by parties other than the trust company.

Said *William W. Harper* executed the third notes, and he and his wife executed the third mortgage, in 1900, for $20,000 to the said trust company, and the mortgage was placed on record. This mortgage purported to be a first mortgage on the land, although the trust company had knowledge of the prior ones. The trust company sold many of the notes to the appellants herein, toward whom it acted in a fiduciary capacity and as to whom it was guilty of fraud and gross negligence in failing to reveal, or in concealing, the insecurity of the investment and various defaults in the payment of interest and taxes.

In 1904 *William W. Harper* conveyed the premises to the W. W. Harper Company subject to mortgage debts, and the conveyance was recorded in 1905. Said *Harper's* wife did not join in the conveyance. In 1909 the said wife, having apparently nothing but her inchoate right of dower, quitclaimed all her right, title, and interest in the premises to the Clark Realty Company and the deed was recorded. On January 5, 1910, the Clark Realty Company executed and delivered to the *Hamilton Realty Company* a warranty deed of the premises subject to the first mortgage, which the *Hamilton Realty Company* expressly agreed to pay. The deed was recorded. In 1913 the W. W. Harper Company quitclaimed the premises to the *Hamilton Realty Company* and the deed was recorded.

In 1905 the first note and mortgage had been assigned to the trust company for value and the assignment was recorded. On or about January 5, 1910, the trust company

and the *Hamilton Realty Company* executed a written extension agreement purporting to extend the time of payment of the first mortgage for five years from November 22, 1909, and the *Hamilton Realty Company* agreed to pay the sum and fulfil the agreements in said mortgage. On November 12, 1910, the trust company deposited the first note and mortgage and its assignments and the extension agreement with the state treasurer under sec. 2024—*77j*, Stats., who has since held them. In consideration of the deposit of these papers the state treasurer surrendered to the trust company other securities of equal par value which had previously been deposited. The state treasurer had at that time no actual notice of the equitable rights of the subsequent mortgagees.

Nothing was placed on record showing the deposit of the securities with the state treasurer. Neither was anything placed on record showing the assignment to appellants of notes secured by the third mortgage.

The W. W. Harper Company, Clark Realty Company, and *Hamilton Realty Company* were owned and managed by stockholders, officers, and employees of the trust company or of the firm of Nath. Pereles & Sons, which was in turn controlled by the majority stockholders and managing officers of the trust company. The W. W. Harper Company was not engaged in any active business, but held the title to the premises merely for the accommodation of the trust company and permitted the latter to receive the rents.

None of the mortgages have been paid. The original makers and subsequent owners of the premises failed to pay the interest on any of the notes secured by said mortgages. and defaulted every year after 1902 in the payment of all taxes and assessments, and permitted the premises to be sold for taxes in the year 1904 and every year thereafter. The trust company bought the premises at each of these sales and holds the certificates.

On October 2, 1913, the banking commissioner took pos-

session of the trust company as a delinquent banking corporation and is engaged in liquidating its affairs. It is insolvent.

The trial court found the facts substantially as above stated. He concluded that by reason of the fraud and gross negligence of the trust company the third mortgagees were entitled to priority over any interest of the trust company or any one standing merely in its shoes in the several mortgages; that the conveyance of the premises by the Clark Realty Company to the *Hamilton Realty Company* of January 5, 1910, was sufficient consideration for the assumption by the latter of the mortgage indebtedness and of the extension of the time of payment to 1914; that the indebtedness was not due in 1910 at the time of the deposit with the state treasurer; that the deposit was made in consideration of the exchange of other securities previously held by him in the trust capacity imposed by the statute; and that the state treasurer thus became a holder for value in good faith and before maturity of the first note, mortgage, and extension agreement, without notice of conflicting equities, and that they are impressed with a trust constituting a first lien upon the premises superior to the lien or equities relied on by appellants.

Judgment was entered accordingly.

For the appellants there was a brief by *Roehr & Steinmetz,* attorneys, and *Julius E. Roehr* and *Geo. Lines,* of counsel, all of Milwaukee; and the cause was argued orally by *Mr. Lines.*

On behalf of the respondents *State Treasurer* and the *Commissioner of Banking* there was a brief by *Fawsett & Smart,* and oral argument by *Charles E. Monroe,* all of Milwaukee.

JONES, J. We have here one of those unfortunate but far too frequent cases where corporations and their officers

have won and betrayed the confidence of many trusting people some of whom have to be shipwrecked.

The holders of notes under the third mortgage were cheated by less intricate methods than are usually adopted by those planning to defraud. So far as appears, they accepted these notes secured by a third mortgage on the mere representation of the trust company that they were secured by a first lien, when the slightest examination would have shown that there was a first mortgage for $10,000 duly executed and recorded in 1893, which mortgage was assigned to the trust company in 1905 and the assignment promptly recorded.

In the present situation one of two classes must suffer loss: either the note holders secured by the mortgage third in point of time and record, or the *cestuis que trustent* of the company, who had the right to rely for security on the mortgage for $10,000 deposited with the state treasurer pursuant to sec. 2024—77*j*, Stats.

It is unnecessary to state the history of the various dummy corporations which the *Citizens' Trust Company* and its officers used to accomplish their purposes, nor the details of the various conveyances which were made after the first mortgage, since the findings of the trial court and the facts conceded by counsel have greatly narrowed the issues. The only question left for us to decide is whether the note holders are to take priority over the persons claiming to be secured by the mortgage first executed and recorded. In other words, whether, on account of the fraud of the trust company in dealing with the note holders secured by the third mortgage, that mortgage under the registry act has become a lien prior to the original mortgage.

As appears from the statement of facts, the trial judge found that by reason of an extension of the time of payment the note secured by the first mortgage was not past due when the securities were deposited with the state treas-

urer. With this conclusion we cannot agree. We hold that the document purporting to give the extension had no effect. It was executed by a corporation which had no shadow of title except a deed by a wife who had only an inchoate right of dower. The deed was given while her husband was living and he was still living at the time of the trial. Under these circumstances the agreement of extension, as well as the agreement to assume the first mortgage, was without consideration and void. Even if the agreement to extend had been valid, it is a grave question whether it could have so revived a past-due note and mortgage as to give it the qualities of paper not due within the meaning of the negotiable instruments act. Counsel for both parties agree that this act has nothing to do with the case and to this we also agree. We also concur in the view held by both counsel that the case is to be governed by the registry law as applied to the undisputed facts.

It is argued by appellants' counsel that the state treasurer cannot be held to be a purchaser in good faith and for value; that the deposit with him was not a transfer; that he acquired no rights by the deposit except the right to possess and dispose of the securities; that he took no title to the note and mortgage, but held them without title or beneficial interest as a mere custodian, and that there was no consideration for the deposit.

Sec. 2024—*77j*, after designating the kinds of securities to be deposited by trust companies, continues: ". . . which cash, bonds, mortgages, or notes and mortgages, or public stocks or bonds shall be approved by the commissioner of banking and shall be held by the state treasurer in trust as security for the faithful execution of any trust which may be lawfully imposed upon and accepted by it; . . ."

In *State ex rel. Sheldon v. Dahl,* 150 Wis. 73, 135 N. W. 474, this court construed the statute and held, among other things, that it is the official duty of the state treasurer "to hold the securities or cash so deposited in trust, the bene-

ficiaries of which trust are the depositors, creditors, and *cestuis que trustent* of the trust company," and that in case of a trust corporation sought to be dissolved by voluntary proceedings under sec. 1789, the treasurer's duty to retain the deposited securities is absolute up to the moment when, under the provisions of that section, the dissolution is complete, and after that time the treasurer remains in possession of the securities still charged with the duties of a trustee but relieved from the absolute mandate to retain possession.

Whether the legal title to the $10,000 note and mortgage was in the treasurer or not, he held them for the beneficiaries named in the statute, and as trustee; he had received them in the regular course of his official business in exchange for other securities of equal value. As said by the trial judge:

"In legal effect, that transaction constituted the performance of an obligation imposed by statute upon the trust company. That deposit was not made as a gift, but, in addition to being in discharge of a statutory obligation, it was expressly in consideration of the exchange of securities of equal value which the state treasurer, acting in the trust capacity created by statute, then surrendered to the trust company. As such trustee, the state treasurer was a holder, for value, in good faith. . . ."

However, it is claimed by appellants' counsel that, if this were conceded, still the lien of the note holders under the third mortgage had become and remained prior to the lien of the original mortgage, since, as it is claimed, the treasurer could acquire no better lien than the trust company. For this claim the case of *Butler v. Bank of Mazeppa,* 94 Wis. 351, 68 N. W. 998, is confidently relied on as authority. This case is also relied on by respondents' counsel, and indeed both counsel largely rely upon and cite the same Wisconsin cases relating to the recording acts, although they come to directly opposite conclusions.

In the *Butler Case* one Larson had given two mortgages on the same land. Both were executed on the same day.

Although by reason of established facts the Butler mortgage was in equity, as between him and Fowler, the first mortgage, nevertheless the Fowler mortgage was recorded about an hour before the other. After this Fowler assigned his mortgage to the Bank of Mazeppa, which took without notice of the real facts, and it was held that under the recording act, since Butler's mortgage was first in fact and recorded before the assignment to the bank, its priority was preserved.

In the case before us the first mortgage was executed in 1893, and so far as the record showed had remained the first mortgage up to November 12, 1910, when it was transferred to the state treasurer, who received it in good faith and for value for the benefit of the *cestuis que trustent.* The third mortgage was executed in 1900. No assignment of it or any interest in it appeared upon the record. There is no claim that the treasurer had any actual notice of any agreement that this mortgage should become a prior lien, or of any fraud which might give it priority.

Although it is a subject not discussed in the *Butler Case,* it is significant that the two mortgages were executed on the same day and that the difference in the time of record was only one hour.

In the *Butler Case* the owner of a mortgage which in equity was a second lien was seeking to subordinate the first mortgage by an assignment recorded subsequently to the recording of both mortgages. In the present case the persons having an unrecorded interest in a mortgage third both in point of time and record are seeking to subordinate the original mortgage to the one in which they have an interest. Their claim of the right to thus displace the lien of the first mortgage is based upon fraud proved by latent facts unknown to the transferee in good faith of the first mortgage. They are not relying upon a recorded assignment to themselves, but upon the record of a mortgage to the trust company long subsequent to the record of the first mortgage.

Appellants' counsel argue that the treasurer is not protected by any assignment of the mortgage or any record of the assignment. The statute regulating the deposit of securities makes no provision for such assignments or recording.

If the note holders had made timely discovery of the fraud upon them they could have brought an action against the trust company to have the third mortgage declared a lien prior to the first and could have prevented its transfer. They made no attempt, either by such a proceeding or by procuring and recording assignments, to give any notice to others that they had a claim to priority resting upon secret facts.

Appellants' counsel rely strongly on the fact that, since the note was past due, the mortgage was a mere chose in action, and the proposition that the state treasurer could take no better right than that of the assignor. It does not follow that the treasurer, whom we hold to be a purchaser in good faith, is chargeable with all secret equities which might exist against the mortgagor of the third mortgage or the trust company. In 19 Ruling Case Law, p. 355, § 126, we find the following statement which seems to be supported by the cases cited to the several propositions laid down:

"While the interest of an assignee of a mortgage, where the obligation secured is not negotiable, is generally subject to all defenses existing at the time of the assignment in favor of the mortgagor or his grantee against the assignor, the great weight of authority is to the effect that such interest is not affected with equities against the assignor in favor of third persons of which the assignee had no notice, for though it is the duty of the latter to inquire of the mortgagor, he is not required to inquire of the whole world as to latent equities. Accordingly, a *bona fide* purchaser for value of a mortgage given without any consideration holds it as a valid incumbrance as against creditors of the mortgagor, since his equities are at least equal to theirs, and in such case the legal title prevails. Furthermore a *bona fide* purchaser of a mortgage, executed apparently on the

same date between the same parties and upon the same property as was another mortgage, is not held to notice of latent equities in favor of the other mortgage by reason solely of the fact that the other mortgage was recorded after the purchased mortgage, but before the transfer."

The facts in this case and the *Butler Case* are so widely different that we cannot give to the latter case the controlling effect claimed for it by appellants' counsel. We must hold that under the facts before us the lien of the mortgage first executed and first recorded has not been displaced and that it remains, in the hands of the state treasurer, the first lien. We are of the opinion that this ruling is in accord with other decisions of this court. *Allison v. Manzke,* 118 Wis. 11, 94 N. W. 659; *Fallass v. Pierce,* 30 Wis. 443; *McDonald v. Sullivan,* 135 Wis. 361, 116 N. W. 10.

It follows that the judgment must be affirmed except in one particular. We have said that the agreement of the *Hamilton Realty Company* to assume the first mortgage was without consideration and void. The judgment must therefore be modified by striking out the part which provides for a deficiency judgment against that company.

By the Court.—Judgment modified as indicated in this opinion, and as so modified affirmed.

PINTER, Appellant, vs. WENZEL, Respondent.

November 19—December 14, 1920.

Negligence: Filling gasoline tank at supply station: Explosion: Burden of proof.

1. In an action for injuries to the rider of a motorcycle when gasoline ran over the edge of the tank onto the hot radiators and exploded while the tank was being filled, evidence which did not show whether the gasoline was spilled over the edge or flowed over it from an expulsion from the container in the process of filling, in connection with the uncontradicted

testimony of an employee of the defendant that the quantity of gasoline ordered by plaintiff had not been supplied when the explosion occurred, is *held* to leave the cause of the explosion to mere speculation and conjecture, and a nonsuit was properly granted.

2. Actionable negligence must be affirmatively shown, and the plaintiff has the burden of showing with reasonable certainty how the accident happened.

APPEAL from a judgment of the circuit court for Milwaukee county: E. T. FAIRCHILD, Circuit Judge. *Affirmed.*

This action was brought for damages for personal injuries sustained by the plaintiff, which injuries plaintiff alleges were due to negligence of the defendant. At the close of the testimony the court granted a nonsuit and awarded judgment dismissing the complaint. This is an appeal from such judgment.

For the appellant there was a brief by *Walter F. Mayer,* attorney, and *Vincent D. Hennessey,* of counsel, both of Milwaukee; and the cause was argued orally by *Mr. Mayer.*

For the respondent the cause was submitted on the brief of *Ray J. Cannon.*

SIEBECKER, C. J. On May 18, 1919, the plaintiff, who was riding a motorcycle, requested an employee of defendant to supply his motorcycle with one gallon of gasoline from a gasoline filling station operated by defendant at a pleasure park owned by him. The plaintiff remained seated on the motorcycle and undertook to hold the hose and adjust the nozzle to guide the flow of the gasoline into the container while the employee of defendant turned the crank of the filling-station tank. The gasoline overflowed the gasoline container of plaintiff's motorcycle and poured over the motor, an explosion occurred, and plaintiff sustained the injuries complained of. Defendant claims that plaintiff ordered his employee to put one gallon of gasoline in the container of the motorcycle; that three complete turns of the crank of the filling pump are necessary to supply one

gallon of gasoline from the filling-station tank; that the operator had turned the crank but two times and a fraction when the gasoline flowed onto the motor and the explosion occurred. The trial court held that the evidence failed to establish actionable negligence on defendant's part. The nonsuit was evidently granted upon the ground that the evidence in its nature will not permit of an inference that the employee of defendant furnished more than one gallon of gasoline as called for by plaintiff. The evidence of defendant's employee who operated the gasoline pump is positive that less than one gallon had been pumped when the explosion occurred. There is no testimony to contradict this unless it be negatived by the fact that the overflow of gasoline onto the hot parts of the motorcycle resulted from overfilling the one-gallon container of the motorcycle. The overflow of gasoline onto the hot parts of the motorcycle seems undisputed. It is to be borne in mind that this overflow may have been caused by a slight spill or spray of gasoline as it passed from the hose nozzle into the motorcycle container, or by having the gasoline spill onto the outside of the container, due to a sudden expulsion or puffing out from the opening of the container in the process of filling. These different ways of causing the gasoline to flow outside of containers are known to occur in the process of delivering gasoline to motor vehicles by the means and in the manner described by the witness in this case. The testimony furnishes no certain and reliable basis for an inference showing what caused the gasoline to flow outside the container and thus come in contact with the hot parts of the motorcycle. This fact remains an uncertainty and a speculation and rests on mere conjecture. *Hyer v. Janesville,* 101 Wis. 371, 77 N. W. 729; *Schell v. C. & N. W. R. Co.* 134 Wis. 142, 113 N. W. 657.

Actionable negligence must be affirmatively shown. The burden rested on the plaintiff to show with reasonable certainty how the explosion was caused. We are persuaded

that the evidence fails to show this fact and that the nonsuit was properly granted.

By the Court.—The judgment is affirmed.

JACOB E. DECKER & SONS, Appellant, vs. MILWAUKEE COLD STORAGE COMPANY, Respondent.

November 19—December 14, 1920.

Factors: Pledge of property for factor's debt: Warehouse receipts: Negotiability: Effect when held by original parties: Trover: Successive tortfeasors: Judgment as divesting title: Application of offsets.

1. In the absence of a statute giving him authority so to do, a factor has no power to pledge for his own indebtedness the personal property of his principal.
2. Sec. 1675—1, Stats. 1915, in effect declaring a warehouse receipt, when not marked "not negotiable," to be negotiable like an inland bill of exchange, according to the law merchant, can aid only a third person into whose hands the receipt comes, and cannot aid a warehouseman to whom the receipt is pledged by the person to whom it was issued—a factor who had stored his principal's goods.
3. The entry of a judgment in one or more actions of tort against separate tortfeasors, who have at different times deprived the true owner of the possession of his property, does not operate to divest the owner of his title. It is only when one of the judgments is satisfied and the owner has received compensation that a tortfeasor can assert title to the property.
4. Under a judgment in an action between D. and C. determining a certain amount to be due from D. to C., and a greater amount to be due from C. to D., and providing for the offsetting of one against the other and for judgment for D. against C. for the difference, D. has the right to declare on which of his obligations C.'s offset shall be applied, no other application having been made by the court or by C.

APPEAL from a judgment of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Reversed.*

The plaintiff is a packing company at Mason City, Iowa. Defendant maintains a cold-storage warehouse in Milwaukee.

Pursuant to written contracts of November, 1916, and February 1, 1917, the plaintiff shipped, under consignment to one Cochrane, doing business under the name of L. A. Cochrane & Company at Milwaukee, a number of carloads of meats to be sold on a commission basis. Cochrane, not having sufficient storage space of his own, from time to time stored certain shipments of plaintiff's meats in defendant's warehouse. Thereupon nonnegotiable storage receipts were issued by defendant to L. A. Cochrane & Company.

A short time before April 30, 1917, Cochrane then having in storage with defendant 183 packages containing 16,501 pounds of pork trimmings and 16,487 pounds of pork loins, desired to borrow $2,600 from the defendant, which, being satisfied that the pork so stored was of sufficient value, agreed to make such loan upon the conditions and in the manner following:

Cochrane's agent, one C. T. Bayorgeon, went to the office of the *Storage Company* on April 30, 1917, and then surrendered the nonnegotiable warehouse receipts for the above mentioned lot of pork. The defendant then issued in lieu of such surrendered receipts its negotiable certificate in manner and form as follows:

No. 3291.

"MILWAUKEE COLD STORAGE COMPANY.
"50–62 Reed Street.
"Milwaukee, Wis., Apr. 30, 1917.

"*This is to certify* that this company, as warehouseman, holds subject to the order of L. A. Cochrane Co., when indorsed hereon, one hundred eighty-three (183) packages marked ——, said to contain 16,501 lbs. pk. trimmings and 16,487 lbs. pk. loins, ——. Storage rate, ——. Accrued charges: Storage, $——; freight, $——; labor, $——.

"Countersigned, (Signed) HARVEY S. PAULL,
"—— ——, Secretary. Treasurer."

Such receipt was thereupon indorsed on the back thereof as follows: "L. A. Cochrane Co., per C. T. Bayorgeon."

At the same time he delivered a promissory note in the usual form for $2,600, signed "L. A. Cochrane Co., per C. T. Bayorgeon." The note also contained the usual power to sell the collateral security, describing as such the said certificate. (Another note for the same amount was subsequently signed in lieu thereof by Cochrane himself, but that part of the transaction is not deemed material in the disposition of this case.)

The defendant thereupon gave its check to Cochrane's agent for the $2,600 which was thereafter cashed by Cochrane. No part of the loan of $2,600 was paid by Cochrane to defendant.

In July, 1917, the plaintiff discovered that the course of dealings by Cochrane with its products was not satisfactory, and after an investigation of its affairs learned of the transaction above set forth between Cochrane and the defendant.

Negotiations were then had between plaintiff and defendant with reference to the delivery of the meats covered by the warehouse receipt. Plaintiff tendered to the defendant payment for the storage charges and other claims which plaintiff admitted the defendant had on account of the storage of said goods under its statutory warehouseman's lien and other than the amount involved in the $2,600 loan. Plaintiff then demanded the delivery of the said lot of meats and defendant refused to do so.

This replevin action was commenced in September, 1917. The goods in question were seized by the sheriff under a writ, and, being perishable property, were sold. The amount realized was greater than the amount claimed to be due on said note with interest.

The claims of defendant as warehouseman against said storage of meat other than claimed on account of the $2,600 loan were disposed of between the parties, and no question concerning them is raised on this appeal.

Subsequent to the commencement of this replevin action Cochrane commenced an action against the plaintiff herein,

claiming that there were amounts due him from the plaintiff on account of the transactions under the contracts between them of November, 1916, and February, 1917. In said action the plaintiff asserted a counterclaim for damages against said Cochrane and among the allegations in that regard appeared the following deemed material on this appeal:

"That during the time the said plaintiff was in the employ of the defendant as defendant's broker in the city of Milwaukee, Wisconsin, as aforesaid, said defendant shipped to plaintiff at Milwaukee, Wisconsin, certain meats and packing-house products of more than the actual market value of twenty-six hundred dollars ($2,600), to be sold for and on account of the defendant and the proceeds thereof accounted for and paid over to the defendant. That the said plaintiff, without the knowledge or consent of the defendant, placed said meats and packing-house products in cold storage in the warehouse of the *Milwaukee Cold Storage Company* at Milwaukee, Wisconsin, and thereafter, falsely and fraudulently representing himself to be the owner of said meats and packing-house products, procured a loan from the said *Milwaukee Cold Storage Company* in the sum of twenty-six hundred dollars ($2,600), and fraudulently and unlawfully and without the knowledge or consent of the defendant pledged said meats and packing-house products as security therefor, and fraudulently and unlawfully, without the knowledge of the said defendant, appropriated and converted the proceeds of said loan to his own use and has failed and refused to account for and pay over to the defendant, although due demand has been made upon him so to do, and the said *Milwaukee Cold Storage Company* now claims a lien upon said goods prior and superior to the plaintiff's rights therein and withholds possession thereof from the defendant, and refused to deliver the same to the defendant, and defendant was compelled to recover possession thereof in an action of replevin; that in said action the question of the priority of the alleged lien of said *Milwaukee Cold Storage Company* on said goods to the rights and ownership of the plaintiff is in question and undecided, and said action is still pending in the circuit court for Milwaukee county, Wisconsin. That upon final determination of said case, if the defendant is compelled to pay said sum

of twenty-six hundred dollars ($2,600) and interest, it will suffer a loss and damage by reason of the fraud, dishonesty, theft, embezzlement, and wrongful conversion by the said plaintiff in said amount, together with costs and expenses necessarily incurred in said action."

Upon the trial of said action between Cochrane and the present plaintiff a special verdict was found, in substance as follows:

1. Defendant is indebted in no sum over and above $1,258.22 (changed by stipulation to $1,522.62, admitted by the defendant to be due on account of miscellaneous charges and claims).
2. Answered by the court: Plaintiff earned gross commissions in the amount of $12,591.36 in his dealings with the defendant herein.
3. The net commissions owing by *Decker & Sons* to Cochrane, leaving out of consideration the amounts involved in the counterclaim, were the sum of $760.90.
4. That plaintiff converted to his own use the goods, property, and moneys of the defendant.
5. That *Decker & Sons* did not waive its right to claim conversion against Cochrane.
6. That $7,850.44 is the damage to *Decker & Sons* by reason of the conversion of its goods, wares, and merchandise or the proceeds of the sale thereof by Cochrane.

The judgment entered upon said verdict determined the total amount due Cochrane to be $2,386.84, and the amount due *Decker & Sons* from Cochrane to be $8,252.13; provided for the offsetting of one against the other, and directed judgment in favor of *Decker & Sons* against Cochrane for such difference, in the sum of $5,865.29, with costs, the form of said judgment "to be in damages and as and for a conversion of defendant's [*Decker & Sons'*] property by plaintiff [Cochrane]."

An appeal was taken by Cochrane from such judgment to this court and affirmed as reported in *Cochrane v. Jacob E. Decker & Sons,* 172 Wis. 38, 177 N. W. 856.

In the action herein a jury was waived and trial by the

court. The findings of fact made, so far as material on this appeal, were in substance as follows:

That the boxes and packages containing plaintiff's meats either bore the plaintiff's trade-mark or had plaintiff's name stenciled upon them and also had tags upon which there were written the contents of the box or package and the name L. A. Cochrane & Co.; that the storage charges were made by defendant against L. A. Cochrane & Co. and all vouchers and bills sent to Cochrane; that up to July, 1917, the defendant had no notice or knowledge that the plaintiff or any other person than Cochrane was or claimed to be the owner of the products which Cochrane was storing in defendant's warehouse; that defendant had no knowledge other than from its own transactions as to the business which Cochrane was conducting or the ownership of the meats which he was storing, and defendant made no inquiry in regard to Cochrane, his business, or those meats; that the issuing of the negotiable warehouse receipt hereinbefore described in lieu of the nonnegotiable receipts for the 183 packages was done by defendant acting in good faith and without notice or knowledge of misconduct on the part of Cochrane; that the defendant acted in good faith in loaning to Cochrane $2,600 for which the above receipt was taken; (13) "that immediately upon issuing the negotiable warehouse receipt No. 3291, Cochrane's agent duly indorsed and delivered that negotiable receipt to the defendant, who has held it ever since as collateral security for the loan of $2,600, which has not been paid."

As conclusions of law the court directed as follows:

"(1) That the negotiable warehouse receipt was lawfully issued to Cochrane and that the defendant is an innocent holder thereof for value.

"(3) That the defendant has been at all times since April 30, 1917, lawfully entitled to that receipt and entitled to the possession of the meat product therein specified, as collateral security for the payment to the defendant of $2,600 and interest thereon from April 30, 1917, at the rate of

six (6) per cent. per annum, according to the tenor of said promissory note.

"(4) That the plaintiff was not entitled to the possession of said property at the time of the commencement of this action; and that the defendant was entitled to the possession thereof.

"(5) As the disposal of the meat in question by the plaintiff, upon obtaining possession thereof under the writ of replevin, prevents the return thereof to the defendant, and the value thereof exceeds the amount of the indebtedness for the payment of which the defendant was entitled to hold the goods as security, the defendant is entitled to judgment against the plaintiff for the sum of $2,600 and interest thereon at the rate of six per cent. per annum from the 30th day of April, 1917, and for the defendant's costs and disbursements in this action, and dismissing the complaint on the merits."

It also appeared without dispute that Cochrane did not pay the judgment against him and had no property out of which it could be collected.

From the judgment entered the plaintiff has appealed.

For the appellant there was a brief by *Lawrence A. Olwell* and *Olwell, Durant & Brady,* all of Milwaukee, and oral argument by *Lawrence A. Olwell.*

For the respondent there was a brief by *Churchill, Bennett & Churchill* of Milwaukee, and oral argument by *W. H. Churchill.*

ESCHWEILER, J. The trial court directed judgment for the defendant upon the theory that although Cochrane, as plaintiff's factor, could not lawfully pledge the meat itself with defendant as security for his personal indebtedness of $2,600, still he might pledge its substitute, that is, the negotiable warehouse certificate, and that the defendant, taking back unto itself in good faith the same certificate, thereby secured a valid existing lien on the meat. This is challenged by the plaintiff.

Respondent contends, first, that the trial court was right

in that contention; and second, that, even though the trial court's view as to the pledge of the certificate be incorrect, the judgment in its favor can be supported on the ground that, by the assertion in the counterclaim in the action subsequently brought by Cochrane against plaintiff herein and the entry of a judgment in such other action in its favor for an amount which included this identical item of $2,600, the plaintiff exercised such an option in its choice of several remedies that it thereby waived its right to assert a claim for the identical property, as is done in this replevin suit. This contention was not passed upon by the trial court, it being deemed unnecessary in view of his holding on the first point.

Cochrane was, under his contract with plaintiff and as held by the trial court, a factor. As such, in the absence of a statute giving him authority so to do, he had no power to pledge for his own indebtedness the personal property of his principal. *Allen v. St. Louis Bank,* 120 U. S. 20, 32, 7 Sup. Ct. 460; *Warner v. Martin,* 52 U. S. 209, 224; *In re Dreuil,* 205 Fed. 568; *Holton & Winn v. John A. Hubbard & Co.* 49 La. Ann. 715, 22 South. 338; 19 Cyc. 123; 11 Ruling Case Law, 761. At the time of this transaction there was no statute so empowering him, as was the situation when the decisions in *Price v. Wis. M. & F. Ins. Co.* 43 Wis. 267, and *Hale v. Milwaukee Dock Co.* 29 Wis. 482, 500, were written.

This doctrine is based upon the established rule at common law that (except in market overt) none can give a better title to personal property by sale or pledge than he has himself. *Commercial Nat. Bank v. Canal-Louisiana B. & T. Co.* 239 U. S. 520, 524, 36 Sup. Ct. 194; *Murray v. Lardner,* 69 U. S. 110, 118; *Nickerson v Darrow,* 3 Allen (87 Mass.) 419; 3 Ruling Case Law, 838; 31 Cyc. 795. See, also, *Pelosi v. Bugbee,* 217 Mass. 579, 105 N. E. 222.

The loan from defendant to Cochrane was prior to the taking effect of ch. 179, Laws 1917, whereby the uniform

bills of lading act was adopted. The parts deemed material of the statutes in force at the time of this transaction are as follows:

Sec. 1675—1, Stats. 1915: "Warehouse receipts, bills of lading, and railroad receipts upon the face of which the words 'not negotiable' shall not be plainly written, printed, or stamped, shall be negotiable as provided in section 1676 of Wisconsin Statutes of 1878, and in sections 4194 and 4425 of these statutes, as the same have been construed by the supreme court."

Sec. 1676, R. S. 1878: "Every warehouse receipt on which the words 'not negotiable' shall not be written or stamped upon the face thereof, shall be deemed negotiable as aforesaid (referring to sec. 1675).

Sec. 1675, R. S. 1878: ". . . shall have the same effect and shall be negotiable in like manner as inland bills of exchange, according to the custom of merchants. . . ."

While this warehouse receipt was in the hands of the defendant which had issued it, although ostensibly and according to the intention of Cochrane and defendant pledged, such receipt had not as yet reached the stage in its existence in which, under the law merchant, the exceptional qualities over the ordinary chose in action are impressed upon instruments of such form and nature.

It is the essence of a bill of exchange that there be three original parties to the transaction: the drawer, the drawee, and the payee, and it is only when a promissory note with but two original parties, maker and payee, has been transferred to a third party that the similarity arises, under the law merchant, between an inland bill of exchange and a promissory note. 1 Daniel, Neg. Inst. (6th ed.) § 29; *Penniman v. Alexander*, 111 N. C. 427, 16 S. E. 408. The same must be equally true of a two-party instrument such as the warehouse certificate here, which, by the statute above cited, is made negotiable only to the extent to which an inland bill of exchange is under the law merchant.

As between the original parties to any of such instru-

ments, the only superiority they have over the ordinary chose in action is that by the law merchant they *prima facie* import consideration. 1 Daniel, Neg. Inst. (6th ed.) § 769.

As appears from facts therein recited, this court was evidently referring to a negotiable warehouse receipt between others than the original parties thereto when it said in *Wall v. Schneider,* 59 Wis. 352, 356, 18 N. W. 443, that "they are negotiable, with like effect as to title as negotiable paper for the payment of money."

As between the pledgor and the pledgee here, such warehouse certificate was in effect no more than a chose in action and could give no greater rights to the pledgee taking its own warehouse certificate than it could have received by an attempted pledge by Cochrane of the same goods. In the absence of some element of estoppel, and none such appears here, the expedient adopted by Cochrane gave no greater or better title to the pledgee, the defendant, than could have been given by Cochrane by the pledge of the property itself. Regardless of the unquestioned good faith on the part of the defendant in this transaction, the true owner's rights were not cut off or diminished by the form that the transaction took in this particular instance. *Commercial Nat. Bank v. Canal-Louisiana B. & T. Co.* 239 U. S. 520, 524, 36 Sup. Ct. 194; *Soltau v. Gerdau,* 119 N. Y. 380, 23 N. E. 864; *First Nat. Bank v. Boyce,* 78 Ky. 42, 55; Elliott, Bailments, p. 102.

The distinction is substantial between where the principal, as here, intrusts personal property to his factor and the situation where a negotiable instrument itself is given to the factor that it, as such negotiable instrument itself, may be sold in the market. The judgment, therefore, cannot be upheld on the grounds upon which it was determined by the trial court.

Neither can the judgment in defendant's favor be supported upon any theory of alleged waiver by plaintiff of its right to maintain this action or by the alleged exercise of its option to choose one of two inconsistent legal remedies.

As we have indicated, plaintiff's ownership and title to the property was not affected by Cochrane's storing it in defendant's warehouse or by his taking a warehouse certificate therefor, although negotiable in form, or by his attempted pledge of such instrument with defendant. Plaintiff had a cause of action in tort against Cochrane when he did so treat the property stored as his own by taking and attempting to pledge the warehouse certificates to secure his own indebtedness. Thereafter, and when the plaintiff learned of the position that this property was in through Cochrane's fraud, and as the lawful owner, demanded it from defendant in whose possession it was, the defendant by its refusal to surrender possession then and there committed a tort as against the plaintiff, however devoid of actual fraud or intentional wrongdoing its former transaction with Cochrane may have been. It owed a duty to plaintiff to restore to it the property of which plaintiff was the lawful owner, and defendant's failure to do so was a breach of such duty and consequently a tort. Plaintiff, still treating the property as its own, might lawfully and properly commence this action for replevin for the return of the property to it as lawful owner.

Upon Cochrane commencing his action for an accounting and damages against the plaintiff arising from their former transactions, the plaintiff here specifically set forth in its answer the situation in which Cochrane's actions had placed the property, alleged that there was a conversion thereof, and prayed for damages for such tort. The judgment as finally entered in such action was for the unlawful conversion of plaintiff's property by Cochrane.

All the way through these two separate actions, therefore, the plaintiff was consistently maintaining that it was the lawful owner of the property and that first Cochrane and then the defendant had by their separate and independent torts deprived the plaintiff of the possession of its property. The question was raised and determined in *Cochrane v. Jacob E. Decker & Sons,* 172 Wis. 38, 177 N. W. 856, and

cannot certainly now be raised in this case, that the counterclaim for fraud and the seeking of damages for conversion could be properly asserted in the action brought by Cochrane against plaintiff based upon contract.

The mere obtaining of a judgment in one or both of two separate tort actions against separate tortfeasors who have each, as in this case, the one at one time and the other at another, deprived the true owner of the possession of his property, cannot be held to divest the true owner of his title to the property. Not until one or the other of such judgments has been satisfied, so that the owner of the property has received payment and compensation for the value of the property, can any tortfeasor assert title has passed from the owner.

While the English courts for a time, and some of the authorities in this country at earlier dates and occasionally one at the present time, upheld and uphold the doctrine that the entry of a judgment was a sufficient renunciation of title, the great weight of authority, and that which we prefer to follow, is that it is satisfaction of the judgment and not the mere obtaining thereof that by law divests the original owner of his title. *Atwater v. Tupper*, 45 Conn. 144; *Miller v. Hyde*, 161 Mass. 472, 37 N. E. 760; *John A. Tolman Co. v. Waite*, 119 Mich. 341, 78 N. W. 124; *Russell v. McCall*, 141 N. Y. 437, 450, 36 N. E. 498; *Kendall v. Stokes*, 44 U. S. 87, 100; *Vandiver & Co. v. Pollak*, 107 Ala. 547, 558, 19 South. 180; 2 Cooley, Torts (3d ed.) p. 881; 26 Ruling Case Law, 1157; 38 Cyc. 2112.

The plaintiff having taken no steps nor assumed any position which indicated that there had been a waiver of the tort committed either by Cochrane or the defendant as to plaintiff's ownership of the property, and nothing having been done by plaintiff indicating that it elected to waive the tort and rely upon an implied contract to pay for the value of the goods, the cases relied upon by defendant, such as *Crook v. First Nat. Bank*, 83 Wis. 31, 52 N. W. 1131; *Smeesters v.*

Schroeder, 123 Wis. 116, 101 N. W. 363; *McDonald v. Markesan C. Co.* 142 Wis. 251, 125 N. W. 444; *Fox v. Wilkinson,* 133 Wis. 337, 113 N. W. 669; *Hargadine-McKittrick D. G. Co. v. Warden,* 151 Mo. 578, 52 S. W. 593; *Shonkweiler v. Harrington,* 102 Neb. 710, 169 N. W. 258; or such cases as *Russell v. Martin,* 232 Mass. 379, 122 N. E. 447, are not in point here.

Plaintiff has the right to declare that the amount admitted due Cochrane from the plaintiff here in the suit against it by Cochrane should be treated as applied to the other obligations of Cochrane to plaintiff and included in the amount of damages determined by the judgment in that action rather than on this $2,600, no other application having been made by the court in that action and Cochrane having failed to assert his right to make such application, if any such right he had. *Nelson v. Davison,* 152 Wis. 567, 570, 140 N. W. 334; *W. H. Pipkorn Co. v. Evangelical L. St. Jacobi Soc.* 144 Wis. 501, 129 N. W. 516; *Coxe Bros. & Co. v. Milbrath,* 110 Wis. 499, 502, 86 N. W. 174; *Zinns Mfg. Co. v. Mendelson,* 89 Wis. 133, 135, 61 N. W. 302; *Grace Harbor L. Co. v. Ortman,* 190 Mich. 429, 157 N. W. 96; 30 Cyc. 1233; 21 Ruling Case Law, 90.

It follows from what has been said that the plaintiff rather than the defendant was entitled to judgment.

By the Court.—Judgment reversed, with directions to enter judgment for plaintiff.

FRIEDRICH, Appellant, vs. BOULTON, Respondent.

November 19—December 14, 1920.

Automobiles: Collision with other vehicle: Contributory negligence.

In an action against an automobile driver for injuries to the rider of a bicycle, where the jury found that defendant was not at fault, the question whether or not plaintiff was negligent became immaterial.

APPEAL from a judgment of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Affirmed.*

Personal injury. This case was once before in this court and is reported in 164 Wis. 526, 159 N. W. 803, where a full statement of the facts is given, illustrated by a diagram. We shall not repeat the statement here. There was a new trial in the circuit court. The matter was submitted to the jury, which found a special verdict as follows:

First. The defendant did not fail to exercise ordinary care in operating his automobile as it approached and collided with the plaintiff.

Second. Not answered.

Third. The plaintiff was guilty of negligence in riding on the path he did in view of the condition of the street, the other vehicles that were going over the viaduct at this time, and the requirements of the ordinance that he keep to the right and as near to the right-hand curb as possible.

Fourth. Such negligence proximately contributed to produce his injury.

Fifth. The plaintiff did not fail to exercise ordinary care in operating his bicycle as he approached the place of collision.

Sixth. Not answered.

Seventh. Plaintiff's damages were assessed at $1,800.

There were the usual motions. The defendant's motion that the complaint be dismissed upon the merits was granted and judgment was entered accordingly, from which the plaintiff appeals.

For the appellant there was a brief by *Lawrence A. Olwell* and *Olwell, Durant & Brady,* all of Milwaukee, and oral argument by *Lawrence A. Olwell.*

For the respondent there was a brief by *Doerfler, Bender & McIntyre* of Milwaukee, and oral argument by *E. L. McIntyre.*

ROSENBERRY, J. The sole error complained of is an instruction of the court relative to sec. 1, ch. 1, of an ordinance of the city of Milwaukee which provides: "Vehicles

shall keep to the right and as near to the right-hand curb as possible." The instruction was:

"The requirements of the ordinance which are referred to in question No. 3, you will understand to be the provisions of the ordinances of the city of Milwaukee that vehicles shall keep to the right and as near to the right-hand curb as possible."

The court also instructed the jury:

"You are instructed that the law did not absolutely preclude the defendant from going to the left of the center of the street the distance reasonably required to enable him to pass other vehicles proceeding in the same direction. If he passed them at all, the law required him to pass to the left of them, and if there was ample opportunity for him to do so and still leave an abundance of room for the plaintiff to pass in the opposite direction, provided he paid reasonable attention to his movements, then the defendant might go as far to the left of the center of the street in passing those vehicles ahead of him as was reasonably necessary."

It is contended that:

"From the first of these quoted instructions the jury are given to understand that an absolute duty devolved upon plaintiff to keep and be at the time of the accident as near the right-hand curb as possible. By the latter quoted instruction the jury were instructed that the defendant had the right to go to the left of the center of the street in passing the coal wagon. Therefore, inasmuch as the plaintiff himself admitted he was, from choice and not from physical necessity, about eleven feet away from the curb at the time of the accident, the jury, because of these instructions, were bound to find that defendant was not negligent and that plaintiff was negligent, regardless of any other circumstances in the case. That the jury so considered the instructions is made obvious by their answer to question No. 5 of the special verdict. They found there that plaintiff was in nowise negligent in operating his bicycle at the time. His only other possible negligence, therefore, was in being at a distance from the curb where, according to the bare terms of the ordinance, he had no right to be, and where the defendant, under the specific instructions of the court, had a right to be."

The argument is that, by reason of the alleged error of the court, the jury were compelled to free the defendant from negligence and find the plaintiff guilty thereof. In the view that we take of the case we are not required to determine whether or not the instruction complained of was erroneous. A full consideration of that question involves a consideration of the validity of the ordinance, a question not argued or presented here. We are unable to see how or in what way the instruction relating to the ordinance referred to in question No. 3 affected the finding of the jury made in response to the first question that the defendant was not guilty of negligence. The jury were fully and correctly instructed as to the duty of the defendant in passing vehicles and what would constitute a want of ordinary care on his part. The instruction was as follows:

"It is the duty of every operator or driver of a vehicle to exercise ordinary care to keep his vehicle under control, with a view of avoiding danger or injury to others. It is his duty to keep his vehicle under such control as will be adequate to prevent probable injury under the circumstances then and there existing, in so far as they are known, or ought in the exercise of ordinary care to be known, or to be anticipated by him, and it is his duty to operate and control his vehicle in such manner as not to fail to perform any duty imposed upon him by law or to violate any of the laws of this state. And you will understand that the operation or control of such a vehicle in such manner as to fail to perform any such duty or as to violate any such law constitutes negligence or a want of ordinary care on the part of the driver thereof."

The instruction required the jury to find that the defendant was in the exercise of ordinary care, taking into account the presence of the plaintiff. Under the instruction as given, the plaintiff's negligence constitutes no excuse or justification for defendant's want of ordinary care. Nevertheless, the jury found the defendant was not at fault. If the defendant was not negligent he is not liable, and whether or not the plaintiff was guilty of negligence becomes an im-

material question. Therefore the judgment of the circuit court was right.

By the Court.—Judgment affirmed.

BRADLEY, Appellant, vs. HARPER, Respondent.

November 19—December 14, 1920.

Bailment: Implied agreement to return property: Evidence: Conversations out of presence of party: Witnesses: Cross-examination as to political declarations: Instruction.

1. In an action for the value of radiators loaned to defendant, manager of a political campaign, evidence on his behalf as to portions of conversations between him and his representative, who borrowed the radiators, which did not occur in plaintiff's presence and which tended to show that they were borrowed by defendant on behalf of a campaign committee, was inadmissible against plaintiff.
2. Where plaintiff had testified that he did not recall a conversation in which he stated that he desired defendant's candidate to win, it was improper for the court to permit a question asking whether defendant did not state that he wanted to see the Socialists cleaned out, since the effect of that question was to prejudice plaintiff in the minds of any Socialists who might be on the jury.
3. In order to constitute a bailment there must be an express or implied agreement to redeliver the property when the purpose of the bailment has been fulfilled.
4. An instruction that the burden was on plaintiff to satisfy the jury that the defendant agreed to return the radiators was erroneous as requiring plaintiff to prove an express agreement to return, where the evidence tended to show facts from which an agreement to return would be implied.

APPEAL from an order of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Reversed.*

This action was brought in the civil court of Milwaukee county to recover the value of six iron steam radiators which it was alleged plaintiff loaned to the defendant and which the defendant failed to return.

The case was tried before a jury, resulting in a verdict

for the defendant. The plaintiff appealed to the circuit court, where the judgment of the civil court was affirmed. From the order of the circuit court affirming the judgment of the civil court plaintiff brings this appeal.

The cause was submitted for the appellant on the brief of *Curtis & Mock* of Milwaukee, and for the respondent on that of *Lorenz & Lorenz* of Milwaukee.

OWEN, J. The evidence on the part of the plaintiff was to the effect that in the month of January, 1916, he was a wrecking contractor and president of the American Wrecking & Salvage Company. Sometime during that month the defendant called him on the telephone and requested the loan of a number of radiators for use at No. 1 Grand avenue, which was being used for the "Bading Headquarters," stating that he, the defendant, would be responsible for their return, and that pursuant to such request on the part of the defendant the plaintiff delivered six steam radiators to said No. 1 Grand avenue, which have never been returned.

Harper, the defendant, who at the time in question was inspector of buildings for the city of Milwaukee, denies that he had any such conversation with *Mr. Bradley*. Harry Booth, a witness on the part of the defendant, testified that during January, 1916, he was deputy inspector of buildings in the city of Milwaukee under the defendant. He testified that at the direction of *Mr. Harper* he telephoned to *Mr. Bradley* or someone in his office that the Bading campaign committee wanted a loan of four or five radiators for use in the building at No. 1 Grand avenue, and asked them to let *Mr. Harper* know if they could be obtained from them; that "a few days later *Mr. Bradley* phoned and said that it was all right; we could have the radiators; he wanted to know how many we required—that I did not know. I said I would tell *Mr. Harper*, and that closed our conversation.

I was talking with *Mr. Bradley* at that time." Later the witness Booth was recalled and examined as follows:

"*Q.* Mr. Booth, at the time you had this telephone conversation with *Mr. Bradley's* office, or the office of the American Wrecking Company, how was it brought about that you had that conversation; how did it happen? I am speaking now of the first conversation that you had with the company where you made inquiries regarding radiators? *A.* I was directed by *Mr. Harper* to make inquiry of the American Wrecking & Salvage Company to see if they could furnish these radiators. *Q.* Just tell us how it happened. Tell me just what was said by *Mr. Harper* at that time."

This was objected to and the objection was overruled. The following answer was given:

"*A. Mr. Harper* came down to the office and said, 'Boys, I want to know if you know where some radiators can be borrowed or loaned for use in building No. 1 Grand avenue. Do you know of any place where we can get them—where they can be gotten?' Someone suggested that they were tearing down the Plankinton——

"Mr. Curtis: I object to that.

"The Court: He may answer.

"*A.* And *Mr. Harper* says, 'Get in touch with *Mr. Bradley* of the Wrecking Company and see if they will let the Bading campaign committee have these radiators,' and that I did. *Mr. Harper* says, 'Let them know as soon as possible if we can have them or not.' So that a few days following *Mr. Bradley* called up. He says: 'It is all right. They can have the radiators, but I want to know how many is needed.' I says, 'I don't know, but I will tell *Mr. Harper.*' That states about all of my connection with the case."

Plaintiff's counsel then moved to strike out all of the witness's answer except that which referred to his conversation with *Mr. Bradley,* which motion was denied. The reception of the evidence of this witness concerning the conversation had between him and *Mr. Harper* is assigned as error. The apparent purpose of the testimony was to show that *Mr. Harper* was not requesting a loan of the radiators

for himself, but for the Bading campaign committee. This conversation was had in the absence of the plaintiff. He knew nothing of the conversation, neither is there any evidence in the case that the substance thereof was ever communicated to him, or that Mr. Booth told him that he was acting at the direction of *Mr. Harper,* who was representing the campaign committee. Mr. Booth's testimony shows that he conducted the negotiations at the direction of *Mr. Harper* and that there was nothing brought home to the plaintiff to the effect that either Booth or *Harper* was acting on behalf of the campaign committee. This evidence, therefore, was improper and must have been prejudicial. The testimony upon the main issue was that of the plaintiff on one side and that of the defendant and Booth on the other. We cannot say that this improper evidence did not have a controlling weight with the jury.

The defendant was also recalled and was permitted to give similar testimony. He was questioned as follows:

"*Q.* You heard the testimony of Mr. Booth in which he said he reported to you that *Mr. Bradley* of the Wrecking Company would furnish the radiators? *A.* I did.

"*Q.* What did you do after that? *A.* I told Mayor Bading at that time——

"Mr. Curtis: I object to that.

"The Court: He may answer.

"*A.* (continuing)—that they could be had from the Wrecking Company."

The plaintiff's attorney then moved to strike out the answer as hearsay, which motion was denied by the court. This testimony was evidently introduced for the same purpose as the testimony of Mr. Booth above referred to and was just as objectionable. For these errors there must be a new trial.

During the course of plaintiff's cross-examination, while he was being questioned with reference to a conversation

which he had testified he had with defendant in his office, the following proceedings took place:

"*Q.* Do you remember stating at the time that you were a Republican and that you wanted to see Mr. Bading win? *A.* I might have made that statement. I don't recall it at this time.

"*Q.* Do you deny having made that statement? *A.* No, sir.

"*Q.* Didn't you make the statement to him at that time that you wanted to see the Socialists cleaned out?

"Mr. Curtis: I object to that as being incompetent and immaterial.

"The Court: It is admissible for this reason: because it goes to the question of the recollection of the witness as to this particular conversation. Questioning him as to his recollection or lack of recollection on this particular transaction. It is questioning him as to his recollection. I think the question is proper, as being part of that conversation, on the question of his recollection. The case may finally have to be decided upon the recollection of the plaintiff and the defendant."

The question and the ruling of the court thereon is assigned as error. The question is properly termed by appellant's counsel as "impertinent." It does not have the remotest bearing on the issue involved. If such was not its purpose, its effect certainly was to prejudice any Socialist there might have been on the jury against the plaintiff. The question was not answered, but it is doubtful whether an answer would have added to the prejudicial effect of the question and of the court's ruling thereon. The latitude which may be indulged in the cross-examination of a witness to test his recollection is largely in the discretion of the court, and legitimate cross-examination for that purpose should not be unduly circumscribed. But trial courts should not permit attorneys to use this right as a subterfuge for placing before the jury matters that can have no other effect than to prejudice the opposing party in the minds of the

jury. That the cross-examination here was not for the purpose of testing the recollection of the witness as to what was said in that conversation is manifest from the fact that the defendant denied ever having any such conversation, while the question assumes that there was such a conversation and that plaintiff then and there stated that he wanted to "see the Socialists cleaned out." Whether or not this circumstance constitutes prejudicial error we need not decide, in view of the fact that we have already pointed out other prejudicial error in the trial of the case. We think, however, the circumstance referred to merits condemnation.

The court charged the jury that "the burden of proof is upon the plaintiff to satisfy and convince you that the defendant agreed to return the same" (radiators). Appellant criticises this statement because it laid upon the plaintiff the burden of proving an express agreement on the part of defendant to return the radiators, and claims the general rule of law to be that one who has received property from another as his bailee or as agent must restore or account for that property to him from whom he has received it. Plaintiff's theory is that the defendant received these radiators as bailee. The law is that in order to constitute a bailment there must be an agreement, express or implied, to redeliver the property bailed when the purpose of the bailment has been fulfilled. 6 Corp. Jur. 1084; *McBride v. McNally*, 243 Pa. St. 206, 89 Atl. 1131, 52 L. R. A. N. S. 259.

From this it is to be seen that in order to prove a bailment it is essential to prove a delivery of property to the bailee coupled with an agreement, either express or implied, on the part of the bailee to return it. The trouble with the charge is that it tells the jury that in order for the plaintiff to recover it was necessary for him to prove an express agreement on the part of the defendant to return the radiators. This is not accurate, and it may well be that the jury arrived at its verdict because it did not find this express

promise on the part of the defendant. It goes without saying that upon the plaintiff's version of the transaction the law implies a promise on the part of the defendant to return the radiators, and it was not necessary for him to prove an express agreement in that respect. It appears from the record in this case that if the defendant is not responsible for the return of the radiators no one else is, and we do not think the plaintiff should be compelled to submit to their loss as the result of a trial tinctured with error, and we are disposed to hold that this statement made in the charge to the jury also constitutes reversible error.

By the Court.—Order appealed from is reversed, and cause remanded to the circuit court for Milwaukee county with instructions to grant a new trial.

FRINT MOTOR CAR COMPANY, Respondent, vs. GENERAL ACCIDENT, FIRE & LIFE ASSURANCE CORPORATION, LTD., Appellant.

November 19—December 14, 1920.

Workmen's compensation: Employee engaged in automobile racing: Insurance: Liability: Hazardous risk.

A compensation policy in general terms, procured by an automobile dealer complying with the workmen's compensation act (sub. 2, sec. 2394—24, and sub. 1, sec. 2394—27), covers a mechanic employed as a pitman during an automobile race who was killed while venturing onto the track, although the insurer had not filed premium rates or classification of employees engaged in automobile racing and there was some evidence that the insured employer, compelled to pay compensation, had not regarded accidents occurring during automobile races as covered by the policy.

APPEAL from a judgment of the circuit court for Milwaukee county: G. N. RISJORD, Judge. *Affirmed.*

Action on an insurance policy to recover a loss sustained under the workmen's compensation act, secs. 2394—1 to 2394—31, Stats. Plaintiff had judgment in the trial court and the defendant insurance company appeals.

Respondent was engaged in the business of buying, selling, demonstrating, and dealing in automobiles in Milwaukee and throughout Wisconsin and maintained a warehouse, garage, and repair shop in connection therewith. For the purpose of advertising, and as its officers said "demonstrating," the cars which it had to sell, respondent from time to time entered cars in races in the territory in which it did business. It did not treat this racing as a separate business, but considered it a part of its business of selling cars.

One Carl Healey was in respondent's employ as a mechanic. He worked on the machinery of cars, and it was part of his business to prepare the cars used in the races for that purpose. During races he was at times used as a "pitman," stationed in an inclosure adjacent to the inner edge of the race track and separated from the latter by a fence. On August 5, 1917, he was so engaged. It was his duty to work on cars at the pit and to have charge of supplies and spare parts and hand them out to those who drove his employer's cars in the races. He was instructed not to enter the track while they were in progress.

During the race one of respondent's cars had trouble and stopped on the track some distance from the pit. Healey entered the track, as it was shown pitmen did at times despite instructions, and ran toward the car. There was a collision with another car and he was killed.

A claim under the workmen's compensation act was opposed on the grounds, *inter alia,* that Healey was not performing services growing out of and incidental to his employment when he was killed and that his employment as a pitman was casual. Both these contentions failed and the award of the industrial commission was affirmed in this

court. *Frint Motor Car Co. v. Industrial Comm.* 168 Wis. 436, 170 N. W. 285. Thereupon respondent paid the award.

Respondent was not exempted from being insured under the compensation act as to the whole or any part of its business. It carried insurance with the appellant company and brought this action to recover the amount of the award which it had been compelled to pay.

Material portions of the policy of insurance read as follows:

"WISCONSIN COMPENSATION POLICY."

"A. . . . [Appellant] agrees to assume and pay all liability, loss and obligation for accidental injuries or death, suffered while this policy is in force at the place or places of work and in the operation of the business described herein, by the employees of . . . [respondent], under the provisions of the workmen's compensation act of Wisconsin, as set forth in . . . secs. 2394—1 to 2394—31 inclusive, according to the provisions of said act, except the liability of the assured for penalties for misdemeanors imposed by secs. 2394—16 and 2394—24 of said act."

"E. This policy does not cover any loss, liability or obligation of the assured for injury to or death of any employees of the assured, whose compensation is not included in the schedule hereinafter set forth. The estimated compensation includes, and the adjustment of same will include, all compensation of every kind earned by all officials and employees of the assured described in said schedule, on page 3 hereof, including the amount paid to contractors and subcontractors."

"(10) No condition or provision of this policy shall be waived or limited except by written indorsement attached hereto, signed by the United States manager."

"SCHEDULE."

"4. Location of all places where the work undertaken by the assured is performed, including shops, yards, offices, work-places or premises of the assured: Milwaukee and elsewhere in state of Wisconsin.

Description of work covered by this policy and classification of risk.	*Estimated annual remuneration.*	*Premium rate per $100 of remuneration.*	*Advance premium.*
(a) All operations [not included in subdivisions (b) and (c)] necessary and incidental to the performance of the work herein described as follows: Operating automobile salesroom, garage and repair shop. The buying, selling, demonstrating and dealing in automobiles throughout the state of Wisconsin	$6,840.00	$0.90	$61.56
(b) Work done at the shops, yards or other work-places or premises of the assured as above located, or work done in connection with or preparation for the work described in (a) foregoing (mining or blasting excluded).			
(c) Elective officers—Office duties only	Excluded.		
Executive officers superintending or doing manual labor	If any.	0.90	
Traveling salesmen	4,200.00	.14	5.88
Clerical force—Engaged in office duties exclusively	2,400.00	.07	1.68
Draughtsmen—Office duties exclusively	No exceptions.		
Drivers—Wherever engaged	Included under Item (a) above.		
Chauffeurs—Wherever engaged	Included under Item (a) above.		
Alterations and repairs and additions	If any.	$4.00	
Total premium sixty-nine and 12/100 dollars			$69.12

"6. If work is done by the assured, or contractors or subcontractors of the assured, and which is not included in the descriptions given, then this policy shall be construed to cover such work and a premium charge made in respect thereof according to the premium rates in use by this corporation, pursuant to sec. 2394—6 of the said act, and if done by contractors or subcontractors shall be based on the amount paid to such contractors and subcontractors."

Besides the facts heretofore stated the trial court found:

"(6) . . . That Healey's work was not materially different at the time of the accident from that which he ordinarily did; that he was a mechanic, kept cars in proper condition and was working as such mechanic and pitman in the regular course of his employment at the time of the accident.

"(7) That at the time the said policy was issued to the plaintiff, the representative of the defendant located at Milwaukee knew that the plaintiff had been engaged to some extent in demonstrating its cars by racing them, and that some of its employees were used in looking after the cars on the racing ground.

"That the racing of its cars by the plaintiff was for the purpose of furthering the sales of its machines, and while it was not the usual method of demonstrating its cars, the plaintiff was engaged in racing for the purpose of furthering its sales, and that racing to that extent was incidental to the operation of the business described in said policy of insurance, but was not a necessary undertaking for that purpose, and not generally incidental thereto.

"(8) That the plaintiff did not maintain a separate organization for the purpose of racing and that nothing appeared on its books or pay-roll to indicate that any of its employees were engaged in such capacity, and the men upon the cars, while racing, were not regularly in plaintiff's employ.

"(9) That during the life of the said policy there were no premium rates on file with the industrial commission of Wisconsin by the defendant covering persons engaged in any manner in automobile racing, nor any classification of any employees so engaged, and that at the time the said policy was issued none of the companies engaged in the business of writing workmen's compensation insurance accepted insurance on persons engaged in automobile racing, and that prior to the time the said policy was issued, plaintiff so knew that the defendant would not write insurance on employees engaged in automobile racing."

The trial court decided that Healey was not employed in racing at the time of the accident and that the provisions of the insurance policy connected themselves up closely with

the compensation act and covered the employment in question. He concluded that respondent was entitled to recover, and judgment was entered accordingly.

For the appellant there was a brief by *Lines, Spooner & Quarles* of Milwaukee, and oral argument by *Charles B. Quarles.*

For the respondent there was a brief signed by *Upham, Black, Russell & Richardson,* attorneys, and *Charles W. Reeder,* of counsel, all of Milwaukee; and the cause was argued orally by *Mr. Reeder.*

JONES, J. When the action between the respondent and Healey, the employee, came before this court, the nature of his employment was in issue and the following language was used in the opinion:

"He was a regular employee of appellant, and his work was not materially different at the time of the accident from that which he ordinarily did. He was a mechanic, kept cars in proper condition, and was working in the regular course of such employment at the time of the injury, therefore his employment was not casual."

It is conceded by appellant that when the accident occurred the employee was in the regular scope of his employment, but it is claimed that he was engaged in racing when killed and that his death was the result of a hazard which was not insured. As supporting this contention it is argued, among other things, that the respondent knew that appellant could not write insurance on employees engaged in racing; that racing was a prohibited risk which was known to respondent; that respondent knew that no classification or rates of premium including racing was on file with the industrial commission and that policies could only be written for risks contained in such classification.

It is further argued that Healey's work as a pitman was more hazardous than the ordinary work in the garage, and that to extend the meaning of the policy to cover the hazard

of racing would be discriminatory and contrary to the language of the statute existing when the policy was issued.

Of course the language of the policy and the statute must be the chief guide in determining whether the policy covered this risk. Clause A, quoted above, is very broad and general in its terms and is intended to give protection for accidental injuries or death suffered at the places and in the kinds of business described. The description of the work included in the schedule is also quite comprehensive.

Appellant's counsel claim that clause E of the policy, above quoted, which excepts any loss or liability for injury or death not included in the schedule, should prevent a recovery. This clause, however, must be construed in connection with paragraph 6, above quoted, which provides that if work is done not included in the description given, the policy shall be construed to cover such work, and provides for making the premium charge in the mode specified. Appellant's counsel give to this clause a very free construction, arguing that it has a different meaning from that expressed in the language used in its literal sense. And they claim that it cannot be said to cover a prohibited risk. There is no express prohibition in the policy or the statute against extending insurance to the kind of work in which Healey was engaged or even against actual racing. The fact that a kind of work is hazardous or more hazardous than other forms of work does not preclude insurance.

The policy must be interpreted in connection with the statutes on the subject (sub. 2, sec. 2394—24, and sub. 1, sec. 2394—27). The former statute provides: "An employer liable under this act to pay compensation shall insure payment of such compensation in some company authorized to insure such liability in this state unless such employer shall be exempted from such insurance by the industrial commission." The statute then proceeds to state the mode of obtaining the exemption.

The respondent had elected to become subject to the terms

of the act and at no time obtained any exemption. In view of these facts it is fair to presume that both respondent and appellant knew that, if any insurance was taken, all the employees in the regular course of employment should be covered. And we do not consider that the insurance company was relieved from the obligation of the contract and the language actually used therein because it had not filed premium rates nor a classification of employees engaged in racing.

Much of appellant's argument bearing on the intention and knowledge of respondent is based upon the fact that it paid employees for minor injuries incurred in previous races and had paid its drivers for injuries received in the same race in which Healey was killed, and had made no claim upon appellant for reimbursement. It is said that "this shows that assured did not consider racing covered until they had a real expensive accident." This position is untenable. None of the previous accidents are shown to have occurred during the period that the policy in question was in force. We are not shown the terms of previous policies. Even if respondent did not consider this class of injuries covered under previous policies, it shows nothing as to its understanding of its rights under this policy, which was drawn under its direction to have it cover all employees. If it showed anything it would show that injuries of the kind in question may have been in respondent's mind as those not previously covered and for which it then wanted insurance. That respondent did not make claim for reimbursement for amounts paid to its drivers who were injured in this race is not very significant, for they were engaged only for the occasion in the absence of its regular drivers.

The claim of knowledge of respondent that racing was uninsurable is further based upon the fact that it had been refused a personal accident policy upon a race driver. This seems to us an entirely different matter from the insurance, under the compensation act, of a whole automobile business,

including all the employees engaged in the various activities not infrequently carried on by those in the business, including such duties as were performed by Healey at occasional races on fair grounds and tracks in the territory where they did business for the purpose of showing off and advertising their cars.

Considerable other testimony was given by both parties relating to the knowledge and intention of respondent and appellant at the time the policy was issued. There might be language in a policy so doubtful or ambiguous that parol evidence of this character would be quite controlling in interpreting its real meaning. But as we construe the policy, in connection with the statute and the former decision of this court above quoted, this is not such a case.

It is significant that the only exception found in the schedule relates to mining and blasting. Applying the ordinary rules for the construction of insurance policies, if the company had intended to avoid liability suffered in other kinds of work in this business of the respondent the exemption should have been expressed.

Appellant urges that the familiar rule as to the strict construction of policies against the insurer does not apply in this case because, it is claimed, respondent framed the policy. We do not feel the need of relying on this rule, but it should be noted that we find no proof that the insured wrote the policy, but merely that the insurance agent was referred to its attorneys to see that it was properly covered.

It is our holding that the risk was carried by the appellant.

By the Court.—Judgment affirmed.

RACINE AUTO TIRE COMPANY and another, Appellants, vs. HANSEN and another, Respondents.

November 19—December 14, 1920.

Appeal and error: Affirmance by divided court.

Where the justices of the supreme court are equally divided in opinion on the question involved on an appeal, the judgment appealed from will be affirmed.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

This action was brought by the plaintiffs to set aside an award of the *Industrial Commission* upon the grounds that the *Commission* acted without and in excess of its powers; that the findings of the *Commission* are not supported by the evidence; and that the *Commission* specifically acted without and in excess of its authority in awarding the applicant, *Hansen,* treble the amount otherwise recoverable for the injury he sustained, upon the ground that *Hansen,* a minor under seventeen years of age, had been employed by the plaintiff *Tire Company* without a written permit as required by sec. 1728*a*, Stats. The circuit court affirmed the award and judgment was entered accordingly, from which judgment the plaintiffs appeal.

For the appellants there was a brief by *Olin, Butler, Stebbins & Stroud* of Madison, and oral argument by *Byron H. Stebbins.*

For the respondent *Hansen* there was a brief by *Guy A. Benson* of Racine.

For the respondent *Railroad Commission* there was a brief by the *Attorney General* and *Winfield W. Gilman,* assistant attorney general, and oral argument by *Mr. Gilman.*

SIEBECKER, C. J. Mr. Justice KERWIN did not participate in the consideration and decision of this case. The court is equally divided in opinion upon the question in-

volved on this appeal. Mr. Justice ESCHWEILER, Mr. Justice ROSENBERRY, and Mr. Justice JONES are of the opinion that the judgment appealed from should be reversed, and Mr. Justice VINJE, Mr. Justice OWEN, and the writer are of the opinion that the judgment should be affirmed. Under the established rule it follows that the judgment appealed from is affirmed. *Swenson v. Flint,* 123 Wis. 613, 101 N. W. 1135; *Hagenah v. Milwaukee E. R. & L. Co.* 136 Wis. 300, 116 N. W. 843; *Estate of Carter,* 167 Wis. 89, 166 N. W. 657.

By the Court.—The judgment appealed from is affirmed.

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, Respondent, vs. THE STATE, Appellant.

November 19—December 14, 1920.

Insurance: Mutual life insurance companies: Loans to policy-holders: Interest as taxable income: Taxation: Pleading: Allegations admitted by demurrer.

1. A complaint in an action by a mutual life insurance company which alleged that it had paid under protest income taxes on interest accrued on loans made to its policy-holders, not paid in cash but added annually to the principal until the loan and interest equals the cash surrender value of the policy, at which time the loan and the policy are canceled, and sought recovery of the sums so paid under protest, not because an annual settlement was not made with the borrowers but because the loans did not result in a profit to the company, does not state a cause of action.
2. A demurrer to the complaint which alleged that no gain or income resulted to the company from the loans in question did not admit such allegation. A demurrer admits all facts well pleaded, but does not admit erroneous conclusions drawn from such facts by the pleader, though bearing the semblance of statements of fact.
3. The fact that a mutual life insurance company has paid all taxes due on the funds it uses to pay policies cannot affect its duty to pay taxes on income derived from loans made by it on the security of such policies.

APPEAL from an order of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Reversed.*

Action to recover the sum of $21,643.07, being the amount of license fees paid under protest by plaintiff on $721,435.77 due in 1919 from its policy-holders but not paid to it in cash otherwise than by annually adding the amount due for interest to the principal of the policy loan. The allegations of the complaint are summarized by counsel for plaintiff as follows:

"Plaintiff's only sources of revenue always have been and now are (a) premiums paid in cash by member policy-holders, and (b) interest or other income derived from the investment of portions of premium payments. All of plaintiff's funds have, therefore, been accumulated directly or indirectly from premiums. Plaintiff has paid all taxes levied by the state of Wisconsin upon income received by it in money since its organization. In order to meet its policy obligations it has been necessary for plaintiff, and it has been required by law, to set aside and accumulate reserve funds, the minimum amount of which for many years has been fixed by the laws of this and other states in which plaintiff does business. These reserve funds plaintiff has kept invested in income-producing securities authorized by the laws of this state. Holders of policies issued by plaintiff have the right to surrender them and receive the surrender value thereof. During the first fifteen years of the life of a policy its surrender value is somewhat less than the reserve thereon, but thereafter the two are the same. Since 1863 plaintiff has been authorized to advance or loan portions of its funds to policy-holders upon the sole security of their policies, and since 1896 the policies have contained agreements to make such loans. Plaintiff has made numerous advances or loans to policy-holders under agreements which provide: 'In case of the nonpayment of any interest on said loan when due, such interest shall be added to and become a part of the principal of said loan and shall bear interest at the rate aforesaid. If and whenever on any day the amount of such principal together with the interest accruing upon the same shall equal the then cash surrender value of the said policy and dividend additions thereto, if any, the said policy and dividend additions

shall thereupon become void without action on the part of said company and be deemed surrendered in consideration of the cancellation of said loan.' Under said agreements plaintiff has no right to enforce payment of either principal or interest, its only right being to offset the aggregate amount of principal and interest against the reserves held by plaintiff to meet its obligations under the policies on the security of which such advances or loans were made. When an advance or loan is made by plaintiff to a policy-holder the surrender value or reserve is thereby reduced by the amount advanced or loaned, and when interest is not paid the surrender value or reserve is further reduced, and when principal and accrued interest equal surrender value or reserve, the latter is wholly exhausted and wiped out and, by the terms of the loan agreements, the policy is deemed surrendered and the loan canceled. Interest accrued and was unpaid in 1918 to the amount of $787,455.74 and in 1919 to the amount of $721,435.77. This accrued but unpaid interest was added to the principal, as provided in the agreements, forming an offset to the reserves, and in some cases wholly exhausting the reserves and working a surrender of the policies and cancellation of the loans. Plaintiff's assets were not thereby increased in any degree. All reserves held by plaintiff against which accrued and unpaid interest was charged or offset had been accumulated and built up out of income received by plaintiff prior to the year in which such charge or offset occurred, upon which income plaintiff had paid all taxes assessed under the law in force when the same was received by plaintiff."

The defendant demurred to the complaint, and the circuit court overruled the demurrer on the ground that, though there was an annual gain to the company, it was not *paid* anything until the policy was canceled by the loan and accrued interest equaling the cash value of the policy, or by death when the loan with accrued interest is deducted from the death benefit, or by a cash payment of the interest or interest and loan by the policy-holder. From an order entered accordingly the defendant appealed.

For the appellant there was a brief by the *Attorney General* and *E. E. Brossard*, assistant attorney general, and

oral argument by *J. E. Messerschmidt,* assistant attorney general.

For the respondent there was a brief by *Geo. Lines* and *Sam T. Swansen,* both of Milwaukee, and oral argument by *Mr. Lines.*

VINJE, J. The gist of the argument of counsel for plaintiff is that since, when interest on a policy loan is unpaid, nothing comes in to the company by way of money or its equivalent, there is neither gain nor loss by the transaction. That when the policy loan with accrued interest equals the reserve they cancel each other, leaving net assets as before. This argument is repeated in varying forms. Thus:

"By the terms of the policy and the loan agreement, whenever the loan with unpaid interest thereon equals the then reserve, both policy and loan are canceled. When that happens the reserve disappears from liabilities and the loan and interest disappear from assets, leaving net assets or unappropriated surplus unaffected." . . . "It is admitted that all the reserves against which the unpaid interest was charged had been accumulated and built up out of money received by the plaintiff in years prior to those in which the unpaid interest accrued and was so charged, and upon which money plaintiff had paid all taxes imposed by law. It is clear, therefore, not only that nothing came in on account of this unpaid interest, there was no gain or increase in plaintiff's total assets, but also that any increase in net assets would result wholly from the transfer on the books from reserve to unapportioned surplus of funds which had already paid all taxes lawfully imposed thereon." . . . "When a policy-holder obtains a loan the company's cash is thereby depleted and, as before stated, the loan becomes an asset secured by the reserve upon the policy, the same as a farmer's note secured by mortgage. Therefore the insured, and not the company, has the use of the money loaned to him, and any income or benefit arising therefrom." . . . "The borrowing policy-holder renders no service whatever to the company; neither does he pay the company anything in money or that which can be converted into money. He

has the sole use of the money which he has obtained from the company. . . . If he dies the company must pay the face of the policy, less only the amount of the loan and interest. For this protection the company receives nothing by way of return upon the money loaned." . . . "When the policy and policy loan are canceled because policy loan and interest have overtaken and equal reserve there is no payment, satisfaction, or release of unconditional debts, . . . but merely the release of one party to a conditional executory contract by the failure of the other party to perform. No service has been rendered by either to the other. No debt has been paid or discharged. Nothing either in money or that which is convertible into money has passed from one to the other. Neither has gained anything. There has been no addition or increment to the estate of either. While the company's book liabilities have been reduced so have the book assets in like amount. The change is altogether in bookkeeping assets; not at all in real assets."

Such is the argument rung in varying changes, and finally an example of a loan is given to clinch it. A policy loan of $9,393 is made upon a policy whose reserve is $9,992.80. At the end of three years and nine months the policy loan with accrued interest amounts to $11,690.63 and the reserve to $11,690.52, and the two cancel each other. Counsel assume the company receives nothing for its loan and then they show that if the company loaned out the same amount to one who paid interest annually it would receive at the end of three years and nine months in cash interest—less three per cent. tax,—the sum of $2,223.16. But they forget to point out that since the company is able to cancel an $11,690.63 indebtedness by a loan of $9,393 through the earnings of the loan such earnings must amount to $2,297.63, which less a three per cent. annual tax, equaling $74.47, leaves the company $2,223.16 for the use of its money the same as on the cash interest paid loan. The original loan of $9,393 has in three years and nine months grown to $11,690.63, and yet they claim there is no gain from the transaction. This and similar arguments above set

forth certainly challenge our attention and make us question our ability to understand correctly.

Just why honest, intelligent, and capable officers of a company should loan millions to its policy-holders without gain when they can loan them to others at a profit, is not so clear. Neither is it clear how such a business in a mutual company can be tolerated by non-borrowing policy-holders. What right does the company have to loan out its funds without profit when they can be made to earn six per cent. by loaning them to non-policy-holders? The question need not be answered, because there is a gain or income to the company from the loans in question. An analysis of the arguments of counsel shows that the fallacy of all their reasoning lies in the fact that they ignore the earned increment of the loan—the added interest charge—that enables the company in time to offset the loan against the cash value of the policy. When the loan is made it is smaller than the then cash value of the policy and cannot offset it. When by reason of the earned interest it equals the cash value of the policy the latter is automatically canceled. Should death occur before the loan plus the added interest equals the cash value of the policy, the loan and interest is deducted from the sum due on the policy. So in any event the company collects the interest. It does so annually. It also does it whenever the loan plus interest equals the cash value of the policy and whenever death occurs during the life of the policy. Since it has collected in advance from the policy-holder the principal of the loan and all the interest the loan can earn before it cancels the policy, it receives the interest every time it adds it to the principal, for by so doing it increases thereby *pro tanto* the company's assets held as an offset to the borrower's assets in the company. It pays itself out of his funds in its hands. The result would be just the same if it took so much cash out of the reserve held for the borrower and paid it to itself without adding it to the principal. The loan earns interest, and the company, by adding

it to its assets as an offset against the assets of the borrower, pays itself.

If the loan were made to B., a non-policy-holder, and the interest collected annually in cash and the loan were called in when the principal together with the interest equaled the then cash value of A.'s policy, the company would be exactly in the same condition as if it loaned the same amount to A. on his policy and his interest accumulated till with the principal it equaled the reserve value of his policy and canceled it. Confessedly the company would receive a gain or income from its loan to B., and confessedly it receives the same gain or income from a like loan to A. When the unpaid interest is deducted from the amount due from the company to the policy-holder he pays it and the company receives it. And it receives it in cash, for it has already in its hands the cash out of which to pay itself.

If the making of the loan be regarded as the opening of an account current in which the policy value is the borrower's item of account drawing interest at the rate at which the company earns for its policy-holders, which is less than six per cent., and the company's item is the loan drawing interest at six per cent., then when its item has earned enough to equal the borrower's item the two cancel each other, each receiving his respective gain from the investment. But perhaps the simplest way to state the proposition is that interest at six per cent. collected from a loan annually results in an annual gain or income to the lender.

It is argued that since the complaint alleges that no gain or income results from the loans in question the demurrer admits the fact. A demurrer to a complaint admits all the facts therein well pleaded, but it does not admit erroneous conclusions drawn from such facts by the pleader even though the conclusions bear the semblance of statements of fact.

If it be said that unpaid interest is charged to the borrower's reserve account but not credited to the account of

the company, the answer is that it should be so credited, and that it remains a credit to the company whether booked as such or not and inures to its benefit when settlement is made.

The fact that the company has paid all taxes due on the funds it uses to pay policies cannot affect its duty to pay taxes upon income derived from loans made by it.

Counsel for plaintiff stated upon the oral argument that if it was held there was an annual gain to the company resulting from the loans in question, then the company should be held to pay a tax on such gain annually even though no settlement had been made with the policy-holder. It follows that the facts stated in the complaint do not constitute a cause of action because the tax in question was lawfully collected and plaintiff is not entitled to repayment thereof.

By the Court.—Order reversed, and cause remanded with directions to sustain the demurrer and to dismiss the complaint upon the merits.

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, Respondent, vs. THE STATE, Appellant.

November 10—December 14, 1920.

Northwestern Mutual Life Ins. Co. v. State, ante, p. 119, followed.

APPEAL from an order of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Reversed.*

Action to recover the sum of $23,623.67, being the amount of license fees paid under protest by plaintiff on $787,455.74 due in 1918 from its policy-holders but not paid to it in cash otherwise than by annually adding the amount due for interest to the principal of the policy loan. The trial court overruled a demurrer to the complaint, and the defendant appealed.

For the appellant there was a brief by the *Attorney General* and *E. E. Brossard,* assistant attorney general, and oral argument by *J. E. Messerschmidt,* assistant attorney general.

For the respondent there was a brief by *Geo. Lines* and *Sam T. Swansen,* both of Milwaukee, and oral argument by *Mr. Lines.*

VINJE, J. The case is similar to *Northwestern Mut. L. Ins. Co. v. State,* decided herewith (*ante,* p. 118, 180 N. W. 138), and is ruled by it.

By the Court.—Order reversed, and cause remanded with directions to sustain the demurrer and to dismiss the complaint upon the merits.

CASES DETERMINED

AT THE

January Term, 1921.

HACKLEY-PHELPS-BONNELL COMPANY and another, Appellants, vs. COOLEY and another, Respondents.

September 22, 1920—January 11, 1921.

Workmen's compensation: Predisposition to disease as preventing recovery for accident: Evidence: Review: Presumption of regularity of official acts: Findings of industrial commission: Recitals as to procedure of commission: Jurisdiction: Attack.

1. Predisposition to disease does not prevent an award under the workmen's compensation act when the disability is proximately caused by accident.
2. In proceedings under the workmen's compensation act the employee's account of his injury, to the effect that he had slipped on some ice and struck his arm against a stump and that slivers had penetrated the arm, was not so improbable as to be unworthy of belief, and the commission was justified in finding in favor of the employee.
3. On appeal from an order affirming an award under the compensation act, the supreme court will not substitute its opinion on a question of fact from a reading of the record for that of the industrial commission.
4. In an action to review and set aside an award of the industrial commission, the presumption of regularity of official acts applies and the award will be presumed to have been regularly made.
5. Findings of fact and an award under the compensation act, reciting that the findings and award are made by the industrial commission, are sufficient. It is not necessary to recite the details of the commission's procedure whereby it finds the facts and makes the award, nor to recite more explicitly than that the commission acts—that it has complied with the law as to the manner of meeting for making its decisions.

6. Because presumption as to the regularity of official acts rules this case, it is not necessary to decide whether one appealing from an award of the industrial commission could have offered proof that the commission had not acquired jurisdiction, or had lost it by not making the award as a body, or whether a direct attack in another form of action would be a proper remedy.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

Applicant *John Cooley* was engaged to perform services for appellant company. On the second day of such services, March 19, 1918, he was working, pursuant to instructions, upon a railroad track in the woods. There was snow and ice on the ground. Applicant testified before the *Industrial Commission* that the day was bright and warm and he had rolled up his sleeves; that he was directed to get some blocks with which to level the track, and for this purpose went apart from his fellow workers, cut a pole, and was returning with it on his shoulder when he slipped on some ice and fell, striking his left arm against a stump; that he continued his work the rest of the day and said nothing about the matter to other workers; that the next day he felt sick and his arm pained him; that he did not work, and on the day following was discharged and left the neighborhood; that his arm got worse, and thereafter he found and pulled out of his arm two long slivers which had penetrated deeply into it. The arm continued to grow worse and shortly thereafter he received medical and hospital attention. Amputation resulted.

The *Commission* held three hearings at intervals of several months. Applicant testified at each of these hearings.

There was testimony of the hospital matron and another that when applicant came to the hospital there were two marks upon his arm, near the seat of infection, where the skin was broken, and which looked as though something might have been pulled out there.

There was testimony on behalf of the appellants by fel-

low employees of the company and the keepers of a boarding house at which applicant lived at times, that his left hand was swollen and discolored before the alleged accident, and that no one had heard of or knew of the alleged accident. Applicant testified that his hand had been calloused but was otherwise in good condition, and this was corroborated by the testimony of persons at the hospital.

Upon the evidence presented the *Commission* found that the applicant and appellant company were subject to the provisions of the workmen's compensation act on March 19, 1918, when applicant sustained an injury growing out of and incidental to the employment which was proximately caused by accident and not intentionally self-inflicted.

The finding stated that, although applicant had not given notice in writing of his claim for compensation within thirty days following the injury, such failure was not with the intention of misleading appellant and did not mislead; that appellant had actual notice of the claim within thirty days.

The findings stated the nature of the injury, the time during which applicant was disabled, the length of time for which he was entitled to receive compensation for permanent injury, and the amounts to be paid for medical and hospital attendance. The award followed the finding and was signed by all the commissioners.

Action was brought by appellant company to review and set aside said findings and award on the grounds, first, that the *Commission* acted without and in excess of its powers in making all of said findings and that the findings were not supported by the evidence; and second, that the *Commission,* as such, did not act upon the matter; that the award is in fact not the award of the *Industrial Commission* acting as such, but that the action was determined by an examiner of the *Commission,* and that the award was that of said examiner.

The circuit court affirmed the award, and from its order so doing this appeal was taken.

The cause was submitted for the appellants on the briefs of *Otjen & Otjen* of Milwaukee, and for the respondents on that of the *Attorney General* and *Winfield W. Gilman,* assistant attorney general, attorneys for the *Industrial Commission,* and *F. F. Wheeler* of Oshkosh, attorney for respondent *Cooley.*

The following opinion was filed October 19, 1920:

JONES, J. 1. Counsel for the appellants admit that, if the testimony of the applicant, *Cooley,* is worthy of belief, there is evidence to support the findings of the *Commission.* Their contention is that his testimony is so improbable as to be unworthy of belief. It may be granted that the account of the injury given by him seems rather improbable in some particulars. Yet the applicant, apparently a man of no particular intelligence or education, told substantially the same story as to the principal facts both to his medical attendants a few days after the alleged accident and at three hearings of the *Commission* at intervals of several months. Some of the most important statements were corroborated by the testimony of the hospital matron and others.

The testimony introduced by appellants tended to show that *Cooley* had been troubled by his left hand for years and that it looked as though it had been frozen. This was controverted, but if conceded to be true it does not necessarily refute the claim that the loss of the arm was nevertheless the result of the accident as alleged. As stated by the circuit judge, predisposition to disease does not prevent an award when the disability is proximately caused by the accident in question.

With the evidence in this condition the *Commission* was entirely justified in reaching the findings it did. It had the opportunity of observing the witnesses, their conduct and demeanor, and it is its function, as it should be, as triers of the facts, to judge of the credibility of witnesses and the weight of their testimony. We should be exceeding our

function were we to substitute our opinion from a reading of the record for that of the *Commission.* The rule is well established by the statute and numerous decisions of this court. *Milwaukee v. Industrial Comm.* 160 Wis. 238, 244, 151 N. W. 247; *Hoenig v. Industrial Comm.* 159 Wis. 646, 150 N. W. 996; *Milwaukee Coke & Gas Co. v. Industrial Comm.* 160 Wis. 247, 151 N. W. 245; *William Rahr Sons Co. v. Industrial Comm.* 166 Wis. 28, 163 N. W. 169; *Wausau L. Co. v. Industrial Comm.* 166 Wis. 204, 164 N. W. 836.

2. Appellants' counsel further contend that the award is not the award of the *Industrial Commission,* but in fact is the award simply of an examiner of the *Commission.* Counsel state in their brief that they have information that the award was not made by the *Commission* acting as a body; that the record was prepared by an examiner of the *Commission* and submitted to the commissioners individually and approved by them separately. They state that under the provisions of sec. 2394—19, Stats., there is no remedy whatever for the review of the action of the *Commission* except by action started in the Dane county circuit court; that the review thus provided for is merely a review of the record and is not a trial *de novo;* and that there is no opportunity to present additional facts showing the absence of official action by the *Commission.* Because of this inability which they claim exists, it is contended that the *Commission* should show upon the face of the record compliance with all jurisdictional requirements; that it met and acted as a commission, and that a record which does not show these facts is defective and should be set aside.

It is not necessary in this opinion to recite at length the provisions of the statute. It is provided that the findings of fact by the *Commission* acting within its powers, in the absence of fraud, shall be conclusive; that an action may be brought for review; that the pleadings, all the testimony and documents and papers taken and filed before the *Commission,* and its orders, findings, and award shall be filed

with the clerk of the circuit court and constitute the record in that court. That such return "of the commission when filed in the office of the clerk of the circuit court shall, with the papers mentioned in section 2898 of the statutes, constitute a judgment roll in such action; and it shall not be necessary to settle a bill of exceptions in order to make such return part of the record of such court in such action."

It is further provided that the court may set aside the order, award, or judgment "only upon the following grounds:

"(1) That the commission acted without or in excess of its powers.

"(2) That the order or award was procured by fraud.

"(3) That the findings of fact by the commission do not support the order or award."

It would be indeed surprising if a party had no opportunity to show, if such be the fact, that a document in the record purporting to be the findings and award of the *Commission* was in fact not the act of the *Commission*. We are not convinced that this assumption is correct. If the charges of counsel amount to allegations of fraud there was an ample remedy by offering proof of the facts alleged. *International H. Co. v. Industrial Comm.* 157 Wis. 167, 172, 147 N. W. 53. Appellants' counsel made no attempt in the circuit court to attack the jurisdiction of the *Commission* or to show that it acted beyond its powers in the mode of making the award, or that the award was procured by fraud. The allegations of the complaint and the assertions in the brief, which are said to be based on "information" and "understanding," are relied on to convince this court that the award is not in fact the award of the *Commission*.

Because our decision is based on another ground it is not necessary to decide whether the appellants could have properly offered proof that the *Commission* had not acquired jurisdiction or had lost it by handing down and recording findings and an award made up in the manner alleged. Nor is it necessary to decide whether a direct attack by another

form of action would be a proper remedy. We base our decision on this point on the well settled rule in favor of the presumption of regularity of official acts.

In this state the rule has been applied to the acts of inspectors of election where the statute required that the ballots should be preserved and disposed of in a certain manner. *State ex rel. Anderton v. Kempf*, 69 Wis. 470, 34 N. W. 226; to the acts of a board of education, *American F. & F. Co. v. Board of Education*, 131 Wis. 220, 110 N. W. 403; to the acts of a board of public works, *Wright v. Forrestal*, 65 Wis. 341, 350, 27 N. W. 52; to the acts of a joint school district board, *Dolan v. Joint School Dist.* 80 Wis. 155, 157, 49 N. W. 960.

The recitals in the findings of fact and award are that the *Commission* makes the findings of fact and that the *Commission* awards. These documents are signed by the commissioners in the name of the *Commission*. The *Industrial Commission* has been created a body of broad powers and great responsibility and it is not necessary that it should recite the details of its procedure whereby it finds the facts and makes the awards, nor that it should recite more explicitly than that the *Commission* acts, that it has complied with the law as to the manner of meeting for making its decisions. During the nine years of the existence of the *Commission* it has decided many hundreds of cases. Those decisions have been acquiesced in by the public, and we cannot agree that the averments and arguments made in this case overturn the presumption as to the regularity of its acts.

By the Court.—Judgment affirmed.

A motion for a rehearing was denied, with $15 costs, on January 11, 1921.

MUELLER & SON COMPANY, Appellant, vs. GOTHARD and another, Respondents.

September 22, 1920—January 11, 1921.

Workmen's compensation: Treble damages to injured minor: Misrepresentation as to age: Constitutional law: Child working without permit.

1. An award of treble damages to an injured minor under the workmen's compensation act should not be set aside because of false representations of the minor as to his age. *Stetz v. F. Mayer Boot & Shoe Co.* 163 Wis. 151, followed.
2. Ch. 624, Laws 1917, providing for treble compensation in cases where a minor of permit age is allowed to work without a permit, is constitutional. *Brenner v. Heruben,* 170 Wis. 565, reaffirmed.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

Action to review an order of the *Industrial Commission* awarding, under the workmen's compensation act, treble damages to a minor in the employ of plaintiff, said minor being of permit age but employed without a permit. It appears that the minor falsely represented himself to be above the permit age and that the employer relied upon such representation in employing him.

The cause was submitted for the appellant on the briefs of *Otjen & Otjen* of Milwaukee, attorneys, and *E. A. Morse* of Antigo, of counsel, and for the respondent *Industrial Commission* on that of the *Attorney General* and *Winfield W. Gilman,* assistant attorney general.

The following opinion was filed October 19, 1920:

VINJE, J. The claim that the award should be set aside because of the false representations of the minor as to his age is disposed of adversely to plaintiff by the ruling in

Stetz v. F. Mayer B. & S. Co. 163 Wis. 151, 156 N. W. 971. A strong appeal and an able argument is presented to the court to overrule its decision in *Brenner v. Heruben,* 170 Wis. 565, 176 N. W. 228, holding that ch. 624, Laws 1917, providing for treble compensation in cases where a minor of permit age is allowed to work without a permit, is constitutional. Counsel for plaintiff presented a brief as *amici curiæ* in that case, and made an oral argument therein. We have carefully considered the briefs filed in this case and find that the arguments but supplement those made in the *Brenner Case.* A reconsideration of the subject matter but confirms us in the view that the *Brenner Case* was correctly decided and should be adhered to.

By the Court.—Judgment affirmed.

A motion for a rehearing was denied, with $15 costs, on January 11, 1921.

FAUST LUMBER COMPANY and another, Appellants, vs. GAUDETTE and others, Respondents.

September 22, 1920—January 11, 1921.

Brenner v. Heruben, 170 Wis. 565, and *Mueller & Son Co. v. Gothard, ante,* p. 135, followed.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

Action to review an order of the *Industrial Commission* awarding treble damages to a minor of permit age allowed to work without a permit.

The cause was submitted for the appellants on the briefs of *Otjen & Otjen* of Milwaukee, attorneys, and *E. A. Morse* of Antigo, of counsel, and for the respondent *Industrial Commission* on that of the *Attorney General* and *Winfield W. Gilman,* assistant attorney general.

The following opinion was filed October 19, 1920:

VINJE, J. This case is ruled by *Brenner v. Heruben*, 170 Wis. 565, 176 N. W. 228, and *Mueller & Son Co. v. Gothard, ante*, p. 135, 179 N. W. 576.

By the Court.—Judgment affirmed.

A motion for a rehearing was denied, with $15 costs, on January 11, 1921.

WESTENBERG, Plaintiff, vs. BHEND, Defendant.

October 20, 1920—January 11, 1921.

Breach of marriage promise: Settlement by giving note: Consideration: Duress: Special verdict: Inconsistency: Findings which are merely conclusions of law: Effect.

1. When an order for a new trial was not based on the exercise by the trial court of general discretion, but solely on the ground that the special verdict was inconsistent, if the trial court was mistaken in this conclusion the order must be reversed.
2. Where it was admitted that plaintiff promised to marry defendant, and the jury found that he had breached the agreement and awarded $1,500 damages to the defendant, and also found that a note of $3,500 given by plaintiff to defendant was not given under duress, their finding that the note was without consideration was simply a finding of a conclusion of law, which was for the court, and should have been changed or disregarded.
3. An answer in the special verdict that the note was without consideration should be disregarded, if inconsistent with other answers, where the great weight of the evidence showed that the consideration for the note was a release of liability for a breach of the marriage promise.
4. A *bona fide* settlement of a breach of marriage promise is a valid consideration for a note.

APPEALS from an order of the circuit court for Dodge county: MARTIN L. LUECK, Circuit Judge. *Reversed on defendant's appeal; plaintiff takes nothing on his appeal.*

This is a consolidated action growing out of two actions;

one commenced by the present plaintiff, *Charles Westenberg*, against the present defendant, *Ella Bhend*, and the other by the present defendant, *Ella Bhend*, against the present plaintiff, *Charles Westenberg*.

The actions were consolidated and continued in the name of *Charles Westenberg*, plaintiff, against *Ella Bhend*, defendant. They were tried to the court and a jury and the following verdict returned:

"(1) Did *Charles Westenberg* break his promise to marry *Ella Bhend?* *A.* Yes.

"(2) If you answer the first question 'Yes,' then answer this question: What sum of money will compensate said *Ella Bhend* for the damages suffered by her in consequence of such breach of promise? *A.* $1,500.

"(3) Did *Ella Bhend* break her promise to marry *Charles Westenberg?* *A.* No.

"(4) If you answer the third question 'Yes,' then answer this question: What sum of money will compensate *Charles Westenberg* for the damages suffered by him in consequence of such breach of promise. A. ——.

"(5) Was the note for $3,500 given under duress? *A.* No.

"(6) Was there any consideration for said note of $3,500? *A.* No."

Motions were made by both parties to change certain answers in the special verdict and for judgment on the verdict. These motions were denied and the court ordered a new trial. Both parties appealed from the order granting a new trial.

Otto Kuenzli of Watertown, for the plaintiff.

For the defendant there was a brief by *Kading & Kading* of Watertown, and oral argument by *C. A. Kading*.

The following opinion was filed November 16, 1920:

KERWIN, J. In granting the motion for a new trial the court used the following language:

"I am of the opinion and hold that the verdict should be set aside and a new trial granted because the answers of the jury to the first and second questions are inconsistent with the answer to the sixth question."

It will be seen from the foregoing that the court did not base the order for a new trial on the exercise of that general discretion which the trial court has on the subject, but solely upon the ground that the special verdict was inconsistent. If this was a mistaken conclusion the order should be reversed, because it cannot be sustained on the ground that it was an exercise of the court's discretion. *Miller v. Casco,* 116 Wis. 510, 93 N. W. 447; *Mullen v. Reinig,* 68 Wis. 408, 32 N. W. 293. The simple question presented, therefore, upon defendant's appeal is whether the verdict is in fact inconsistent, and, if not, whether the defendant should have had judgment on the verdict.

In the issues formed in the consolidated action the defendant had two claims or causes of action against the plaintiff; one for damages for breach of promise of marriage, and another to recover upon a $3,500 note given in settlement of the breach-of-promise cause of action. These issues were litigated in the case. It was admitted that the plaintiff, *Charles Westenberg,* promised to marry the defendant, *Ella Bhend,* and the other issues, namely, that plaintiff, *Charles Westenberg,* broke his promise to marry defendant, and that she sustained $1,500 damages in consequence thereof, that defendant did not break her promise to marry plaintiff, *Charles Westenberg,* and that the $3,500 note was not given under duress, are well supported by the evidence and constitute the particular facts which show a consideration for the note given, when taken in connection with the other undisputed facts in the case.

The consideration for the note, therefore, being established by facts going to show consideration, the finding of the jury in the sixth answer was simply a finding of a conclusion of law and was a question for the court, and should either have been changed or disregarded, since the finding of facts, admission of the parties, and undisputed facts constitute a verity on the question of consideration for the note. *Robinson v. Washburn,* 81 Wis. 404, 51 N. W. 578.

Moreover, in the case at bar there is practically no

evidence to support the conclusion in the answer to the sixth question of the special verdict, and even if the answers were inconsistent the unsupported answer should be disregarded. *Welch v. Dunning,* 163 Wis. 535, 158 N. W. 323. In view of the fact that it is admitted a promise of marriage was made and the great weight of the evidence showing that the promise was breached, and there being practically no evidence of want of consideration, the answer to the sixth question should have been changed by the court or disregarded. It being established that a cause of action existed for breach of promise which resulted in damages to the defendant, the case was a proper one for settlement, and the settlement of such claim was sufficient consideration for the note.

Some question is made by counsel for plaintiff to the effect that the settlement resulting in giving the $3,500 note was obtained by duress and that the note was without consideration. A *bona fide* settlement of the matter in dispute in this case furnished a valid consideration for the note given. This doctrine is well settled in this court. *Kercheval v. Doty,* 31 Wis. 476; *Kowalke v. Milwaukee E. R. & L. Co.* 103 Wis. 472, 79 N. W. 762; *Galusha v. Sherman,* 105 Wis. 263, 81 N. W. 495. The jury found against duress in this case, and the evidence established without substantial dispute that the settlement was made and the note given in compliance with said settlement in satisfaction of the damages.

We are therefore satisfied that upon any theory of the case the court below was in error in ordering a new trial, and that upon the verdict returned and the evidence the defendant, *Ella Bhend,* was entitled to judgment upon the note given.

By the Court.—The order granting a new trial is reversed on the defendant's appeal, and the cause remanded with directions to the court below to change the answer to the sixth question from No to Yes and award judgment to the

defendant, *Ella Bhend,* for the amount of the note. The plaintiff, *Charles Westenberg,* takes nothing upon his appeal.

A motion for a rehearing was denied, with $25 costs, on January 11, 1921.

EVANS, Respondent, vs. EVANS, Appellant.

October 20, 1920—January 11, 1921.

Mortgages: Deed as mortgage: Evidence: Sufficiency.

In an action of ejectment brought by the plaintiff, holder of the legal title to a farm, against the defendant, who counterclaimed asking that the deed upon which plaintiff relied be declared a mortgage and for an accounting, the evidence of an experienced lawyer showing that he advised the plaintiff and her son (under whom the defendant claims) that an absolute deed given to secure a debt was in effect a mortgage; that the plaintiff said she wanted a deed, not a mortgage; and that the son said he would trust his mother, and that a deed was thereupon made, together with evidence to the effect that the farm conveyed was worth $16,000 and that the plaintiff had loaned her son $6,000 and had made admissions that she held the title of the land as security,—is *held* sufficient to establish that the deed was in fact a mortgage, the plaintiff making no effort to show what was the real consideration for the deed.

APPEAL from a judgment of the circuit court for Dodge county; MARTIN L. LUECK, Circuit Judge. *Reversed.*

Ejectment. Defendant counterclaimed alleging that she is the owner of the land; prayed that the deed under which plaintiff claimed title be declared a mortgage, and for an accounting. The court found the title to be in the plaintiff. refused to declare the deed to her a mortgage, and refused an accounting. From a judgment entered accordingly the defendant appealed.

For the appellant there was a brief by *Healy & Healy* of Beaver Dam and *C. J. Laurisch* of Mankato, Minnesota, and oral argument by *Mr. John C. Healy* and *Mr. Laurisch.*

For the respondent there was a brief by *Brossard & Zeidler* of Columbus, and oral argument by *E. E. Brossard.*

The following opinion was filed November 16, 1920:

VINJE, J. Mindful of the rule that it requires clear, convincing, and satisfactory evidence to reform a written instrument, and of the further rule that findings of a trial court will not be set aside unless clearly against the preponderance of the evidence, we nevertheless in this case unanimously reach the conclusion that the trial court erred in not finding that the deed was in fact a mortgage and that an accounting should have been taken. Plaintiff was the mother of defendant's husband, John Evans, who died in war service. He had been married before, and Mr. Wilson, a lawyer residing at Mankato, Minnesota, and a witness in this case, had secured a divorce for him from his first wife. They had lived upon a farm belonging to his mother and John had not made a success of farming. The result was that his mother had from time to time advanced money to him aggregating upwards of three or four thousand dollars. The evidence is vague and uncertain as to the amount. The last time she helped him was when she signed a note for him for $400 to settle up his divorce suit. The marriage of John to the defendant did not seem to please his mother, yet she was willing to help them get started on the land in question, which John had received by devise from his grandfather subject to a life estate in John's father, who was living at the time the deed in question was made. The farm is worth about $16,000. The deed was executed on the 11th day of September 1917, and Mr. Wilson, the lawyer who drew it, testified as to what occurred as follows:

"When they came in the office, John, in substance, said: 'Do you remember that $400 note mother signed with me, and I got the money from your bank?' and I says, 'Yes.' 'Well,' he says, 'she has arranged to let me have more money to buy stuff to go on the farm and she wants me to give her a deed to the farm in Wisconsin to secure the money

she loans me,' and I said, 'Well, why don't you give her a mortgage?' Then she spoke up and said, 'I don't want a mortgage, I want a deed, and whenever John pays me back I will deed the land back to him. John don't know how much it will be anyway. If he will give me a mortgage he will have to be giving other mortgages.' John said, 'What I want to know is whether, if I give her a deed, have I a right to get it back whenever I pay her,' and I said to that, 'Yes, if you give a deed to secure the money you borrowed, the legal effect of it is just the same as a mortgage.' 'Well,' he says, 'that is all I want to know; then you make your deed.' Then I said to *Mrs. Evans,* 'Do you want to give him a contract to convey it back?' She says, 'No, John can trust his mother. I will give it back to him whenever he pays up.' John says, 'Yes, I am not questioning my mother about giving it back, I know that she will do that. Further I wanted to know from you whether a deed is the same as a mortgage and whether I have a right to get it back when I pay up,' and then I prepared this deed. There was no money paid by *Mrs. Evans* to John at the time in my presence. I was interested in the bank to which I referred, which was the National Citizens' Bank of which I was director. I handed the deed to John. I don't know whether he did anything with it in my office or not. I later had a conversation with *Mrs. Evans* with reference to the transaction in the month of January, 1918. This conversation was at my office. It had reference to this deed. She said she had a letter from John; John wanted to know how to fill out his questionnaire in reference to this farm, and I said to her, 'Do you still have the title?' and she said 'Yes,' and I said, 'Did John ever pay you the money you loaned him, and for which you got as security the deed for this farm?' Then she said 'No.' Then I said, 'You should tell John that he should put down in the questionnaire that he owns this farm subject to the amount of money that he owes you.' I had a further talk with *Mrs. Evans* in the month of February, at the end of the month or the first of March, over the telephone. I recognized her voice, and she said to me, 'Have those Germans been to see you?' I said, 'What do you mean?' 'Well,' she said, 'I mean John's father-in-law.' 'Yes,' I said, 'he and John were here;' and she said, 'What did they want?' I said, 'They claim that you say that you would not give them the farm back now if

John pays you what he owes you.' 'Well,' she said, 'I hope you won't do anything for them.' I said to her, 'I could not handle their case for them if they had one.' I said, 'I do not understand the position you are taking, *Mrs. Evans;* you certainly know that this land was deeded to you to secure your loan to John, but it seems, too, you ought to give the farm back to John if he pays up.' 'Well,' she says, 'I am better able to take care of that farm than John is.' I think she said something about him going to the service, she did not know what would happen. I had a later talk with her, after John had gone into the service, with reference to the deed, over the telephone, in the month of November, 1919. She called up and she says, 'I understand you are working against me.' I said, 'No, *Mrs. Evans,* I don't know what you mean, I don't know that I am working against you.' She says, 'Are you going to be a witness in that case against me?' I said, 'I could not say that I am or am not, but I would naturally suppose that I would be.' Then I suggested to her again, 'I can't understand why you won't give up that farm if you get your money; you certainly know the way in which it was deeded to you.' 'Well,' she says, 'if John would come back I would just as soon turn it over to him; but,' she says, 'I am not going to give it to this woman.' When she referred to Germans I knew she referred to John's wife's people."

Cross-examination: "I practiced law twenty-three or four years. I am now in the Minnesota State Bank Building. Mr. Laurisch is in the National Citizens' State Bank Building across the street. Mr. Laurisch and I are not greater personal friends than other lawyers in the city of Mankato. I have been against him in about as many cases as I have been associated with him. When John came to my office about this case I told him I could not take his case. He did not tell me that his wife did not want him to go into the army. He did not come to have me assist him to get out of the army. I did not tell him to go to Mr. Laurisch or that I would be a better witness than lawyer. I remember what I told *Mrs. Evans* on the first hearing. My stenographer, Ethel Skuse, was not in the room when the deed was made, until the deed was prepared. She then took the acknowledgment. She prepared the deed on the machine and I sat there and told her what to write in. I told her to put in as consideration one dollar and other

valuable consideration. I knew that John was owing his mother $400 upon a note which was not yet due. It was a note that was given to pay alimony, at the bank of which I am a director. I knew what the terms of the deed were, and I did not take John's case because I felt that in all probability I would have to be a witness. I felt in fairness and justice to all the parties to the transaction that I should be a witness. I did not mention Mr. Laurisch's name to him. He suggested Mr. Laurisch when he could not get me. His wife was not with him, his father-in-law was. I did not actually know last November whether I would be a witness or not. I naturally expected to be. I was never advised that this case would be tried at New Ulm in 1919 and never heard anything about it. I first learned that I would be a witness in this case about ten days ago. I was asked to come here. *Mrs. Evans* had a telephone conversation with me in March, 1918. When John came first to me I did not remember that she told me that Mr. Laurisch had told John that if he owned the farm he now lives on he did not have to go to war. That was the time she asked if the Germans had been to see me. The only Germans was his father-in-law. John was not a German. I told her that I—as I did at other times—that I expected to be a witness. I told her that so far as starting proceedings, I would not have anything to do with it—that I expected to be a witness. John never asked me if he could not give his farm to his mother. I understood that the personal property was used up to pay his debts. I knew his mother had helped him. I think I have made a warranty deed for property intended to be a mortgage without a contract to reconvey, during my career as a lawyer. One instance was Mr. M. E. Babcock. There was a contract to reconvey about seven or eight years ago. John asked me if he could get it back if he paid. The statement was made that *Mrs. Evans* was loaning more money that day. Outside of that I did not know of any money that was owing. I did not put in the amount of money in the deed there was already due and owing from John to his mother, as I did not understand they were deeding then, as she was going to loan him more money that day, so I did not think it necessary to make any such statement. I did not know that it purported to be a gift. I have plenty to do as a lawyer. I have had other instances of this kind. I don't know now for sure

as I can name them. At the time of the divorce John made no claim one way or another of owning this property. He was obtaining a divorce from his first wife and $400 was borrowed at the Citizens' National Bank, and his mother signed with him, in January, 1917. I think the note may become due the last days of July. Plaintiff's Exhibit 2 is not the note. It might be a renewal. I executed that mortgage or drew that deed September 11th. She gave another note on the same day that deed was given, for $560. That note has been paid, by *Mrs. Evans* about April 15th, as I understand, and I know it through the records in the bank. I have seen the note there and that it was paid, but the record nowhere shows who paid it. That $400 note which you have was for the debt for the note prior to that. I presume this is a renewal of it. I do not remember of John having any other notes at the bank. There was a $1,000 note, but my recollection is that *Mrs. Evans* signed that alone."

Redirect examination: "I was judge of probate in our court in 1898; from 1900 to 1906 I was prosecuting attorney. During the war I was connected with the Food Administration in Blue Earth county as the official food administrator in our county. I was a director in the Minnesota Commission of Public Safety and president of the Blue Earth County Safety Association, and director and representative of the War Industries Board. I knew the husband of *Jane A. Evans* in his lifetime."

Recross examination: "I came here to testify because I was asked to come. I was not subpœnaed. I live in another state. Nobody is running my business while I am away. I thought it was my duty to come."

We have set out the evidence of Mr. Wilson almost in full because his testimony is the turning point of the case and was evidently so considered by the trial court, for he says in his written opinion:

"The circumstances disclosed by the evidence, independent of the testimony of S. B. Wilson, relied upon by the defendant in support of her allegations, when considered in their most favorable light are no more persuasive than are those which point to the deed as expressing the real intent of the parties."

He then goes on to state why the testimony of Mr. Wilson does not satisfy the rule as to the character of evidence necessary to reform a deed. He says:

"The testimony of Mr. Wilson does not convince me that this deed ought to be transformed into a mortgage. He is a lawyer with a large practice. The rule of law herein stated as to the nature and weight of the evidence is as old as the practice of the courts of equity in reforming written instruments on the ground of mistake. Mr. Wilson was without doubt familiar with this rule of law and was aware of the difficulties likely to be encountered if an appeal had to be made to the courts to correct the instrument. His plain duty required that he draft the instrument so as to contain the entire agreement of the parties. There is no claim that a defeasance clause was inadvertently omitted; on the contrary it appears that it was done intentionally. It seems incredible that a lawyer with the experience of Mr. Wilson would have deliberately drafted and placed his name as subscribing witness to a deed, absolute in form, if the parties had told him that they merely desired something drawn that would make the land security for a loan. The evidence is not sufficient, in my opinion, to warrant the reformation of the deed."

It will thus be seen that the trial judge was influenced largely in reaching the result he did by what he regarded as an incredible, if not wholly unprofessional, act on the part of Mr. Wilson to draw a deed absolute that was intended as a mortgage. That such acts are occasionally done by reputable lawyers, the experience and observation of every Justice of this court affirms. Mr. Wilson explained fully the legal effect of their acts and suggested that the plaintiff should give a written contract to reconvey. She said the son could trust her and he said he could. What further was there to do than to allow the parties to have such a writing as they both agreed upon after its true effect was fully and correctly explained to them? There was a good reason why plaintiff wanted a deed instead of a mortgage. Her son had not shown himself to be either a

good business man or a good farmer. The mother knew that, and so she said when Mr. Wilson suggested that a mortgage be given, "I don't want a mortgage, I want a deed; .... if he will give me a mortgage he will have to be giving other mortgages." She wanted to put it out of her son's power to incumber the land to others, and this could be done by his deeding it to her. That she was then sincere in intending to reconvey when she was repaid, or at least when she thought it was safe and prudent to re-invest him with the title, may be admitted. Subsequent events no doubt changed her mind—especially the death of her son and the consequent passing of the title not only to strangers in blood but to one she disliked. It is therefore because we are satisfied that the trial court applied a wrong test to the testimony of Mr. Wilson—looking upon the acts testified to by him as so unusual as to be practically incredible—that we the more readily set aside his findings. To us the testimony of Mr. Wilson rings true. An old, experienced lawyer, who, as the evidence shows, for nearly a quarter of a century has enjoyed the confidence of the people in the community in which he has lived, evidenced by the numerous offices of trust that he has held, and who has no interest in the result of the case, but who came to testify because, as he truly said, he regarded it as a matter of duty, would not be likely to perjure himself. And what reputable lawyer would not testify under the same or similar circumstances? Considering the contents and character of the evidence given by him, he could not be mistaken through forgetfulness. His testimony is either true or false. We think it true We arrive at this conclusion both from the intrinsic character of the testimony and its consistency with what was probable under the circumstances. Here was a young man, a farmer, just married, who had received from his grandfather land worth about $16,000. His mother was well-to-do. She had advanced him considerable sums of money. She was going to advance him more. He was not very thrifty and she feared he would incumber the land if he held

the title. The son, upon being told that his mother could hold the title as security, consented to passing it to her. He said he could trust her. They did not know how much she would eventually have to loan him. But whatever it might amount to, she held the deed as security for it. That he should at the threshold of life, with a wife to support, absolutely give to his mother, who did not need it, all the property he owned, even if he had received upwards of $6,000 from her, seems incredible. It would still constitute a gift of some eight or ten thousand dollars. Sons are not and ought not to be so generous to their mother—especially just after marriage.

In view of the convincing and specific proof produced by the defendant it was incumbent upon plaintiff to show just what the consideration of the deed was. This she fails to do. Her evidence is vague and evasive. She stands upon the deed, but gives no satisfactory reason why a court of equity should permit her to stand there. It is true that the son in his war questionnaire said that he had deeded the land to his mother, and another witness testified that he said the same thing to him. And so he had; but the conditions under which the deed was given were not stated. Later he sought to correct the questionnaire by showing such conditions. On the other hand, there is the testimony of quite a number of witnesses that plaintiff had admitted at various times before the suit was begun that she held the title as security only. But even if we assume, as the trial court did, that the evidence, aside from Mr. Wilson's testimony, is as persuasive for one party as the other, we think that his testimony unquestionably discloses where the truth lies and should decide the case.

By the Court.—Judgment reversed, and cause remanded with directions to declare the deed a mortgage, and to take an accounting as prayed for by the defendant.

The respondent moved for a rehearing.

In support of the motion there was a brief by *Brossard &*

Zeidler of Columbus, attorneys for the respondent, and *Regan & Grogan* of Mankato, Minnesota, of counsel.

In opposition thereto there was a brief by *Healy & Healy* of Beaver Dam and *C. J. Laurisch* of Mankato, Minnesota, attorneys for the appellant.

The motion was denied, with $25 costs, on January 11, 1921.

FLORSHEIM and others, Respondents, vs. REINBERGER, Appellant.

October 21, 1920—January 11, 1921.

Statute of frauds: Reformation of deeds: Mutual understandings intentionally omitted from deed: Restrictive easements: Enforcement: Equitable estoppel: Way of necessity: Right of owner of fee to maintain gates.

1. A legal restriction on the use of lands conveyed must be in writing under sec. 2302, Stats., and a deed cannot be reformed to include a mutual understanding which was not to be inserted in the deed.
2. While courts of equity will, under some circumstances, imply and recognize restrictive equitable easements not recognized by courts of law in order to protect parties in the use of their property, and while such easements usually arise out of written covenants, yet this is not essential.
3. An agreement restricting the use of property which was not inserted in the deed will not be enforced as creating an equitable easement where there are no rights arising from acts or conditions long enjoyed and where the parties have made no improvements in reliance thereon nor acted on a scheme of improvement of adjacent property such as to arouse the court's equitable power by way of estoppel.
4. Where the record sustains a finding that a certain roadway is a private way over which defendant has only an easement by necessity, the defendant will be enjoined from removing, destroying, leaving open, or otherwise rendering useless, gates reasonably maintained thereon by plaintiff.

APPEAL from a judgment of the circuit court for Oneida county: A. H. REID, Circuit Judge. *Reversed.*

This action was brought to reform a deed of real estate

purchased by defendant from plaintiff *Florsheim* and to permanently enjoin the defendant from using said real estate for other than private residential purposes. Plaintiff *Florsheim* claims that at the time of the sale of the real estate in question he and the defendant orally agreed that the real estate should be used for private purposes only, and that defendant would conform to and abide by a general scheme and plan of the plaintiffs to establish on their properties a "colony of friends," in which no summer resort was to be operated. The plaintiffs also seek to enjoin defendant from using a private road of plaintiff *Florsheim* other than as an easement by necessity, and to restrain him, his agents and servants, from removing, destroying, leaving open, or otherwise rendering useless, gates across this road.

The case was tried before the court. Judgment was entered permanently enjoining the use of defendant's property for other than private residential purposes, and enjoining and restraining defendant from removing, destroying, leaving open, or otherwise rendering useless, gates maintained by plaintiff *Florsheim* on this private road. This is an appeal from such judgment.

E. D. Minahan of Rhinelander, for the appellant.

A. J. O'Melia of Rhinelander, attorney, and *Carl B. Rix* of Milwaukee, of counsel, for the respondents.

The following opinion was filed November 16, 1920:

SIEBECKER, C. J. The court found "that on September 6, 1917, the plaintiff *Florsheim* purchased the property now owned by defendant, commonly known as the Darrow property, for the purpose of removing and getting rid of the public resort then being operated thereon and to bring the property within the scope and extent of the plan and scheme of the plaintiffs in the use of such property, and the said *Florsheim* was urged and requested by the other plaintiffs to make such purchase aforesaid;" that such Darrow property was thus made a part of this general plan and

scheme so mutually undertaken by plaintiffs; that the defendant was fully apprised of this arrangement and plan between plaintiffs; that *Florsheim* purchased the Darrow property for the purpose of having its use as a public resort changed to the use of residential property only and to make it a part of a scheme and plan of a "colony of friends" along the lake shore, upon which all the property of plaintiffs abutted; that defendant, when he purchased the Darrow property thereafter from *Florsheim,* orally agreed to abide by this plan and scheme of these adjoining property owners and agreed not to use the Darrow property for the purposes of a public resort and to devote it exclusively to private residential purposes and farming.

It appears that defendant, during the summer season of 1918, used the Darrow property he had so acquired for public resort purposes, contrary to such oral agreement entered into between him and *Florsheim* when it was deeded to him by *Florsheim* for a valuable consideration. The deed contains no covenants restricting the uses to which the property so conveyed is to be devoted, nor is there any reference to a plan or scheme that he and the plaintiffs were to use their properties for residential and farming purposes. The trial court correctly held that the facts do not justify a reformation of the deed conveying the Darrow property to defendant, *Reinberger,* by inserting a covenant restricting its use in conformity to the plan and scheme of devoting this and plaintiffs' property to residential and farm purposes. It is clearly shown there was no understanding between *Florsheim* and *Reinberger* that any restrictive covenant was to be inserted in the deed. On the contrary it appears that by a mutual understanding a restrictive covenant was not to be inserted in the deed. As a naked oral agreement it cannot be relied upon in an action of law because of its failure to conform with the requirements of sec. 2302, Stats., providing:

"No estate or interest in lands, other than leases for a term not exceeding one year, nor any trust or power over

or concerning lands or in any manner relating thereto shall be created, granted, assigned, surrendered or declared unless by act or operation of law or by deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same or by his lawful agent thereunto authorized by writing."

By the deed *Florsheim* parted with and conveyed to defendant all "the estate, right, title, interest, claim and demand whatsoever" which he had in the property in law and equity. No rights in and to real property, nor trust or powers over the same, can be granted by parol. *Rice v. Roberts,* 24 Wis. 461; *Clute v. Carr,* 20 Wis. 531; *Duinneen v. Rich,* 22 Wis. 550; *Brandeis v. Neustadtl,* 13 Wis. 142.

The court granted plaintiffs relief upon the grounds that the oral agreement among plaintiffs and the parol agreement between *Florsheim* and defendant to the effect that they all would devote their lake-shore property to residential and farm purposes, thus establishing a general plan and scheme for a friendly neighborhood of homes, and excluding the annoyances of a public resort adjacent thereto, created an equitable easement or servitude respecting these properties, and that equity would enforce this plan and scheme as a mutual right between these owners, upon the principles of estoppel. Among the cases relied on as authority to sustain this ruling are *Tallmadge v. East River Bank,* 26 N. Y. 105; *Lewis v. Gollner,* 129 N. Y. 227, 29 N. E. 81; *Hall v. Solomon,* 61 Conn. 476, 23 Atl. 876; *Doran v. Graham,* 195 Ill. App. 65; *Allen v. Detroit,* 167 Mich. 464, 133 N. W. 317.

From an examination of the foregoing cases and others cited to our attention it appears that courts of equity under some circumstances will imply and recognize an easement which is not recognized as such in courts of law. They are brought into existence under circumstances requiring their enforcement to protect parties in the use of their property.

"Their most prominent and frequent illustration is presented by the owner of a tract of land selling it off in separate

lots or parcels to different purchasers and inserting in the deeds, or otherwise imposing upon the vendees, stipulations as to the kinds of buildings which may be erected upon the property, or the trades or sorts of business which may be there carried on, or the uses in other respects to which it may be put." 1 Reeves, Real Prop. § 148.

It is declared that by reason of their character these easements are treated as negative equitable easements. They rest on mutual rights between landowners, and usually arise through the imposition of a general scheme or plan referred to, imposed by a common grantor or mutual grantors in the development and improvement of tracts of land. Though such easements usually arise out of written covenants, yet this is not an essential. Courts have enforced them when they rested in parol, as in the *Tallmadge* and other cases, where the owner of a tract of land had planned to erect houses according to a scheme which he exhibited to purchasers, assuring them they were to be erected and used as represented. Purchasers with notice thereof were held bound by such plan though not so specified in their deeds. In the case of *Allen v. Detroit,* 167 Mich. 464, 133 N. W. 317, and other cases relied on by the respondents, this equitable doctrine was applied under the varying facts and circumstances involved. These adjudications deal with cases where the right arose out of acts and conditions which had been enjoyed and existed for long periods of time and where the parties had improved their property in reliance thereon, and where the servitude was of a character showing that the owners had in fact acquiesced and acted on the scheme in improving property for its permanent enjoyment. The instant case lacks in all these features. There is nothing in the evidence to indicate that the parties intended to effect a change in the improvement of properties in reliance on this scheme or subject them to uses other than those enjoyed by the owners theretofore, aside from the fact that they purposed that the public use of the Darrow property was to be changed to a residential and farm purpose. The

evidence wholly fails to indicate anything in reference to the continuity or permanency of this so-called "colony of friends." This alleged right rests upon a mere parol arrangement for carrying it out. Obviously either of the parties could readily render it ineffectual by transferring his property to a third party without knowledge of such plan and thus terminate it as to all the other parties. This feature of the right thus asserted takes from it the character of permanency and impairs it as a valuable adjunct to the different properties of the plaintiffs. The whole scheme seems to have been conceived for the individual pleasure and benefit of the present occupants and fails to show that the parties had an intent that the restriction should become appurtenant to the property. These characteristics of the right as asserted by plaintiffs show it is not within the rule of the cases relied on to arouse the equitable power of the court by way of estoppel for its enforcement, and cannot be recognized to nullify the defendant's right to stand upon his deed and enjoy and use his property free from the burdens thus sought to be imposed on it by a parol agreement made contemporaneously with the conveyance of the property to him by an absolute deed in fee simple. Such a deed is a solemn instrument intended to recite definitely and fully any condition that attaches to the right, title, and interest in the land, and cannot be restricted in equity upon the facts and circumstances resting in parol as shown in this case.

The court found:

"There seems to be no doubt that the road extending from defendant's property eastward to where it unites with the public highway is a private way over which the plaintiff *Florsheim* has some dominion and across which he has a right to maintain reasonable gates. The defendant should be restrained from interfering with such reasonable maintenance of gates."

An examination of the record satisfies us that this finding is sustained by the evidence and that the part of the judg-

ment declaring said defendant and all other persons claiming or holding under him to be restrained from using such private way other than as an easement by necessity for the use of defendant's property, and to "be enjoined and restrained from removing, destroying, leaving open, or otherwise rendering useless, gates reasonably maintained by the plaintiff *Florsheim* on said private way running over and across his property through said lots 7 and 8 in an east and west direction," is proper and should be awarded, but that the other parts of the judgment are not justified by the record. The judgment must therefore be reversed, and the cause remanded to award judgment respecting the use of gates on the private way as heretofore indicated.

By the Court.—Judgment reversed, and cause remanded with directions to award judgment as indicated in this opinion.

A motion for a rehearing was denied, with $25 costs, on January 11, 1921.

DIECK, Respondent, vs. OCONTO COMPANY, Appellant.

November 16, 1920—January 11, 1921.

Logs and logging: Construction of contract: Proof of custom: As to sorting logs: As to furnishing cars: Time of custom: Special presumption: Verdict: Method of computation not manifest: Accord and satisfaction: Question for jury.

1. In a contract to cut, log, and deliver timber on cars as directed by the owner, the provision relative to direction by the owner authorized him to direct details with reference to the prosecution of the work, but did not authorize him to require the sorting of the timber, which work was reasonably worth several thousand dollars.
2. Custom cannot be proved to modify or contradict the terms of a written agreement (*Clarke v. Maisch*, 171 Wis. 225, followed); but where the terms of the contract were ambiguous, evidence as to custom or usage was admissible in order to determine whether the logger was required to sort logs, where it was not expressly stated in the contract.

3. In an action to recover the value of extra services rendered in connection with the contract, where there was no express provision as to sorting the logs and the evidence showed a custom that such work was not required unless specified, it was proper to submit to the jury the question whether the contract required plaintiff to sort the logs.
4. To render evidence of a custom admissible to aid in construing an ambiguous contract it must be shown that the custom existed prior to the making of the contract; and a custom originating subsequent thereto cannot be considered in construing it.
5. Error in admitting proof of a custom in the logging industry in the year subsequent to the execution of the contract does not require a reversal, since the court can indulge the special presumption that the custom was not of recent origin but was coincident with the growth of the industry, in which similar contracts were common.
6. A logging contract requiring the contractor to deliver on cars, without specifying who should furnish the cars, is so ambiguous as to render admissible evidence of a custom of the owner of the logs to furnish them, though in the absence of evidence of such custom the contract will be construed to require the contractor to furnish the cars. *John O'Brien L. Co. v. Wilkinson,* 117 Wis. 468, distinguished.
7. Where the evidence showed that the contractor did not sort all of the logs cut, a finding by the jury as to the quantity he did sort, which was apparently an honest endeavor by them to determine a question peculiarly for their consideration, will not be disturbed on appeal, though the method by which they arrived at their verdict was not manifest.
8. Where defendant's testimony strongly tended to show a complete settlement and an accord and satisfaction between the parties, but the plaintiff denied that the settlement included the items in controversy, the question whether these items were settled was clearly a jury question.

APPEAL from a judgment of the circuit court for Oconto county: W. B. QUINLAN, Circuit Judge. *Reversed.*

The defendant owns and operates a sawmill and wholesale lumber yard at Oconto, Wisconsin, and is the owner of a large quantity of standing timber in Oconto and Forest counties. Its mill at Oconto is supplied largely from this timber, some of which is cut and logged by the defendant itself, while other parts of it are logged under contract with third parties, which are known as jobbing contracts.

On September 9, 1912, the *Oconto Company,* the defendant, entered into one of these contracts with Glynn & Bryce, a copartnership composed of George Glynn and and John Bryce. The contract was in writing and, so far as material here, provided that

"for and in consideration of the payments hereinafter to be made by parties of the first part, the parties of the second part agree to cut, log, and deliver on cars all of the timber, cedar, and hard wood, ties, posts, poles, pulp wood, and bark on the following lands, as directed by the party of the first part. [Here follows a description of the land and a schedule of the prices to be paid.] Each logging year shall commence on September 1st and shall terminate the following May 1st, unless otherwise directed by the party of the first part. Parties of the second part agree to cut and remove timber and products from sections or parts of sections located in above described towns and ranges as directed by party of first part, and to log and deliver on cars not less than four million feet nor more than five million feet during each logging season."

Glynn & Bryce logged under this contract during the season of 1912 and 1913. The contract was assigned by Glynn & Bryce to *Herman Dieck,* the plaintiff, September 12, 1913, with the consent and approval of the defendant. *Dieck* started logging under the terms of the contract in the fall of 1913 and operated thereunder during four successive logging seasons, completing the contract during the logging season of 1916 and 1917. Settlements were made between the parties at the end of each logging season, by which *Dieck* was paid in full for all timber logged and placed on cars, at the schedule of prices provided for in the contract.

This action was brought by *Dieck* to recover for extra services rendered by him in sorting the logs, which he claims he was not required to do by the terms of the contract, and for extra labor which he was obliged to perform in decking the logs at the landing (railway track) because of the failure of the defendant to furnish cars in sufficient numbers to enable him to load the logs directly on the cars. It is the

claim of the defendant that the contract by its terms required *Dieck* to sort the logs and furnish the cars, and that, consequently, it is not liable for the extra labor and services so performed.

The case was tried before a jury and a special verdict consisting of twenty-one questions and answers returned. Among other things it was found that during the years 1913 to 1917 there was a general as well as a local custom in Oconto and adjoining counties that a contract providing for logging and placing the logs on cars was fulfilled, in the absence of cars, by decking the logs at the landing (railway track); that these customs were known to the *Oconto Company* and *Herman Dieck* at the time the latter took the assignment of said contract from Glynn & Bryce, and that when the Glynn & Bryce contract was assigned to *Herman Dieck* the *Oconto Company* and *Dieck* contracted with reference to and in conformity with said custom; that during the years 1913 to 1917 there was a general as well as a local custom in Oconto and adjoining counties among lumber companies and jobbers that the sorting of logs was not required unless expressly stated in the contract, which custom was known to the *Oconto Company* and *Herman Dieck* at the time the written contract was assigned to *Dieck,* and that when the contract was assigned the *Oconto Company* and *Herman Dieck* contracted with reference to and in conformity with said custom, and that the contract did not require *Dieck* to sort the logs; that during the term of the contract *Dieck* sorted 3,416,946 feet of logs, the reasonable value of which was one dollar per thousand; that during the term of the contract *Dieck* decked, on the landing, 1,785,199 feet of logs, which were thereafter loaded on cars; that the reasonable value of decking said logs on the landing was sixty-five cents per thousand, and of loading them on cars after they had been so decked, eighty-five cents per thousand.

Upon motions made after verdict the court changed the answer of the jury to the sixteenth question by which it was

found that the number of feet of sawlogs which *Herman Dieck* sorted during the term of the contract was 3,416,946 feet, to 8,991,129 feet, and ordered judgment for the plaintiff upon the special verdict as so amended. Pursuant thereto, judgment was entered in favor of the plaintiff for $12,457.81, damages and costs. From the judgment so entered the defendant brings this appeal.

For the appellant there was a brief by *Classon & Whitcomb,* attorneys, and *Allan V. Classon,* of counsel, all of Oconto; and the cause was argued orally by *Allan V. Classon* and by *E. M. Smart* of Milwaukee.

For the respondent there was a brief by *Eberlein & Larson* of Shawano, and oral argument by *A. S. Larson.*

OWEN, J. Evidence offered by the plaintiff was admitted to prove oral conversations occurring between the plaintiff and the defendant prior to the time of the assignment of the contract by Glynn & Bryce to *Herman Dieck,* which plaintiff contends amounted to a contract on the part of the *Oconto Company* to furnish the cars for the loading of the logs. This evidence was objected to by the defendant, and its reception is assigned as error, because the original contract between the defendant and Glynn & Bryce is "an agreement that by its terms is not to be performed within one year from the making thereof," which by sec. 2307, Stats., is required to be in writing, and such a contract cannot be modified by parol agreement. The circuit court held that it did not appear upon the face of the contract that it was not to be performed within one year from the making thereof, consequently it was not within the statute of frauds and was a contract which might have been modified by an agreement resting in parol. In the view we take of the case it will be unnecessary to review the ruling of the court in this particular or to consider other theories advanced to justify the reception of this evidence, and hence we pass this feature of the case without further notice.

Two principal questions are involved: one, whether the contract required the logger or jobber to sort the logs; and the other, whether it was the duty of the company or the jobber to furnish the cars. The answer to both questions depends upon a construction of the following paragraph of the contract:

"Witnesseth, that for and in consideration of the payments hereinafter to be made by the parties of the first part the parties of the second part agree to cut, log, and deliver on cars all of the timber, cedar, and hard wood, ties, posts, poles, pulp wood, and bark on the following lands as directed by the party of the first part."

We discover nothing in other parts of the contract which throws any light upon the question of whether the undertaking of the jobbers to "cut, log, and deliver on cars" included the duty of sorting the logs, or upon the question of whether cars were to be furnished by the jobber or the company. Nowhere is the question of sorting expressly mentioned in the contract, and whether the undertaking to "cut, log, and deliver on cars" imposed upon the contractor or jobber any duty with respect to the sorting of the logs is certainly a matter of much doubt.

On the part of the appellant it is argued that the phrase "as directed by the party of the first part" placed the entire operations under the supervision and direction of the company, and that by virtue of that provision of the contract it was within the authority of the company to require a sorting of the logs, and that in order for the jobber to "cut, log, and deliver on cars as directed by the party of the first part" it was necessary for the jobber to sort the logs if so directed by the company. It is apparent that by the phrase "as directed by the party of the first part" the company retained a certain supervision and direction over the logging operations, but just how far that extended is not easy of determination. Manifestly it could direct which tracts of timber were to be logged first, and probably many other details with refer-

ence to the prosecution of the work; but we are not disposed to hold that the company, by virtue of the phrase under consideration, could impose requirements upon the contractor for extra labor and services on his part running into thousands of dollars. This does not seem reasonable. It is well known that men who undertake the performance of contracts must understand with some definiteness the amount of work they are required to do, and that people of ordinary intelligence will not enter into contracts by the terms of which extra work may be imposed upon them over which they have no control, of the amount of which they can form no estimate, leaving it within the power of the other party to convert a profitable into a ruinous contract. Neither is it profitable for the owner to ask a contractor to figure on work of such an indefinite character that to protect himself from loss the contractor must take into consideration and figure on contingencies which may never be met and for the performance of work which may never be required of him.

In this case *Dieck,* at the request of the defendant, rendered services in the matter of sorting logs which the jury estimated to be of the value of $3,416 and which the court valued at $8,991. It is not reasonable to suppose that any intelligent person would enter into a contract where extra labor and services to any such an amount could be required of him at the discretion of the other party. We therefore hold that whatever be the extent of the authority reserved to the company by the use of the phrase in question, it did not vest the company with discretion to require *Dieck* to sort the logs in the manner he was directed to sort them and in which he did sort them. If such duty rested upon him at all, it arose from the contract, and did not rest in the discretion of the company.

The court submitted to the jury the question whether there was a general and local custom with reference to the sorting of logs where it was not expressly stated in the

contract. The jury found that such general and local custom existed, and that according to such custom, both general and local, sorting was not required unless expressly stated in the contract. The appellant claims this was error on the part of the court, and relies upon the proposition that custom cannot be proved to modify or contradict the terms of a written agreement. This principle has been recently declared by this court. *Clarke v. Maisch,* 171 Wis. 225, 177 N. W. 11. In that case it was also stated that proof of custom and usage is permissible "to define what is ambiguous or is left indeterminate in a contract, where both parties have knowledge of the custom or are so situated that such knowledge may be presumed." We think the situation here presented affords a peculiarly proper case for resorting to proof of custom or usage in order to determine whether the terms employed in this contract bound the logger to sort the logs as he did pursuant to the direction of the defendant. Such proof does not contradict the terms of the written agreement, but assists in the construction of its ambiguous terms. Upon evidence, the sufficiency of which is not challenged by the appellant, the jury found that by such usage and custom the logger was not required to sort the logs unless it was so expressly stated in the contract. In response to an appropriate question it was further found that the contract under consideration did not require the logger to sort the logs. Under the circumstances, this was a proper question to submit to the jury. *French v. Fidelity & C. Co.* 135 Wis. 259, 269, 115 N. W. 869. These considerations lead to the conclusion that the plaintiff was not required to sort the logs in the manner he did sort them pursuant to the directions of the defendant.

We have been somewhat disturbed by the fact that the proof, and the finding of the jury, with reference to the customs proven related to the time "during the years 1913 to 1917." Now the custom which may be proven as entering into and forming a part of a contract must be a custom

existing at the time the contract is made. This contract was made in 1912. There is no proof here of any existing custom duing the year 1912. Plainly, the custom during the years 1913 to 1917 was immaterial. In order to affect this contract it must have been a custom existing at the time the contract itself was made. A custom arising subsequent to the making of a contract cannot be considered in construing the contract or in determining the intent of the parties as expressed in the language used. However, we do not feel that a new trial should result for this reason. There is no reason to believe that the custom found by the jury suddenly came into existence within a year after this contract was made. Logging operations have been carried on in Northern Wisconsin for many years, during which time contracts such as this have been common. The custom or usage we are discussing was no doubt a growth or development coincident with that of the timber industry and had become recognized in 1912 as well as in 1913. We think that justice will be done, and the circumstances justify us, in indulging the presumption that the customs which were proven to have existed "during the years 1913 to 1917" also existed at the time the contract was made. This should not be construed as countenancing a departure from the general rule that a custom which may be considered as an aid in the construction of a contract must be a custom existing at the time the contract is made. The presumption here indulged is a special presumption which we feel is warranted by general knowledge of the lumber industry, and in the belief that by its indulgence justice will be promoted and this litigation, burdensome to both parties, be terminated.

The next troublesome question is whether by the terms of the contract the plaintiff or the defendant was required to furnish the cars upon which the logs were to be loaded. With reference to this matter the contract is also silent. Appellant contends that the contract is not ambiguous in this particular because it has been held by this court as a

matter of law that such a contract requires the one who undertakes to place logs upon the cars to provide the cars necessary to receive the logs, and cites the case of *John O'Brien L. Co. v. Wilkinson*, 117 Wis. 468, 94 N. W. 337. We can see little difference between the contracts there involved and the one here under consideration. In that case the contracts required the defendant to cut the logs from plaintiff's land and deliver them on board cars. The question involved was whether the plaintiff or the defendant was required to furnish the cars. The court refers to the general rule "that one undertaking to load logs upon railroad cars ordinarily assumes the duty of obtaining the cars on which to load the logs, as much as any other implements with which to do the work." That case was before the court on demurrer, and no custom or usage to the effect that under such circumstances it was the duty of the owner of the logs to furnish the cars was alleged. The court was obliged to determine from the bare terms of the contracts upon whom was devolved the duty of furnishing the cars, and by the application of the rule stated it was determined that it was the duty of him who undertook to load the logs on the cars to furnish the cars necessary to accomplish the result. Here, however, we have proof of a general and local custom and a finding of the jury that such general and local custom required the owner of the logs to furnish the cars. This circumstance distinguishes this case from *John O'Brien L. Co. v. Wilkinson, supra.*

Somewhat the same question was involved in *Vogt v. Schiencbeck,* 122 Wis. 491, 100 N. W. 820. In that case the owner of lumber contracted to sell it to the plaintiff and deliver free on board cars at Butternut. There the relation of vendor and vendee existed, and, while it was held that it was the duty of the seller to furnish the cars, it was stated in effect that proof of a general custom so well established as to become a part of the contract might impose the duty upon the other party. That is a statement of the law

which we deem applicable to the situation here. The parties here are not vendor and purchaser. Where that relation exists the law is plain, we think, that it is the duty of the vendor to procure the cars upon which to load the product which he has sold and agreed to furnish f. o. b. cars. Where, however, the relation between the parties is not that of vendor and vendee, the law in that respect is not so well settled; and while the conclusion reached in *John O'Brien L. Co. v. Wilkinson, supra,* was probably inevitable where the duty must be determined from the bare terms of the contract, nevertheless it is not so well settled that proof of a general custom known to the parties at the time of making the contract, and with reference to which they were presumably contracting, cannot be shown, because in so doing it varies the terms of a written contract. If such proof was proper in the *Vogt Case,* it is much more appropriate here. We hold that, notwithstanding the ruling in *John O'Brien L. Co. v. Wilkinson, supra,* contracts of this nature are sufficiently ambiguous to justify proof of a custom such as was here proven, in order to place the court in the position of the parties at the time the contract was made and to enable it to properly construe the language used in the contract. The jury having found that by the general and local custom with reference to such contracts it was the duty of the defendant to provide the cars, the contract must be so construed. Here, too, the custom proven related to the time "during the years 1913 to 1917." The presumption indulged with reference to the custom previously discussed will be applied here, to prevent a new trial.

The jury found that by reason of the failure of the defendant to seasonably furnish sufficient cars plaintiff was required to deck at the landing 1,785,199 feet of logs. The finding of the jury in this respect is not seriously challenged by either party, and it must stand. The jury found that the plaintiff, during the term of his contract, sorted 3,416,946 feet of logs. The court changed this to 8,999,129 feet,

which was the entire amount logged by *Dieck* during the term of the contract. Appellant claims this was error. The court acted upon the theory that *Dieck* sorted all of the logs cut. We are persuaded that the difference arising between court and jury with reference to this matter arose because of a difference in understanding as to what constituted a sorting under the testimony with reference to custom. The instructions given to *Dieck* with reference to sorting was to "cut, skid, and deck together, the white pine, hemlock, and tamarack. The maple and birch can be skidded and decked together. The elm and basswood, as well as the cedar, will each be decked separately." It thus will be seen that the soft wood was only to be sorted from the hard wood. The pine, hemlock, and tamarack were not to be sorted from each other. The maple and birch were to be decked and skidded together. The elm and basswood and the cedar were to be separated and decked separately. Each kind of timber was not to be separated from every other kind of timber and decked by itself. The pine, hemlock, and tamarack were to be sorted only from the other kinds of timber, and this was true of the birch and maple. In one sense of the word this might have constituted sorting of all the timber, but the jury had a right to find that it was not the kind of sorting which constituted extra labor or services of the value of one dollar per thousand.

Theodore Van Rossum, one of plaintiff's witnesses, who gave rather straightforward testimony concerning the custom in this respect, stated that under a contract such as this he would expect to sort the soft from the hardwood timber without extra compensation. That *Dieck* did not claim compensation for sorting all of the logs is indicated by his complaint, wherein he claims compensation for sorting 7,810,000 feet of logs only, and by his testimony, from which it plainly appears that he did not put in a claim for sorting all of the logs. He said: "I still claim that I am entitled to one dollar per thousand for sorting all of the *larger* timber

cut during the four years from the *Oconto Company.*" Upon his cross-examination under sec. 4096, Stats., he was asked this question: "You knew during the spring of 1914–1915 that you would have to sort the logs before you began cutting? *A.* Yes, sir. *Q.* Did you sort them? *A.* Sorted some of them, some I did not." And again he testified: "I didn't put in a claim for all of them because some of them I didn't, like cedar and that stuff, I didn't figure that that way—different timber; I did not have to sort that." Besides this, there is testimony to the effect that a few carloads of mixed and unsorted timber were shipped to the company's mill at Oconto, from all of which it appears plainly that plaintiff is not entitled to compensation for sorting all of the timber cut.

It is not very plain how the jury arrived at the amount of timber sorted. However, we think that the evidence was susceptible of various views concerning what constituted sorting under the custom or usage proven, and that it was peculiarly a question for the jury first to ascertain what sorting was required by the express terms of the contract and then to ascertain the sorting which was done by the plaintiff over and above the sorting required by the terms of the contract, thereby arriving at the amount sorted by the plaintiff, for which he was entitled to the compensation of one dollar per thousand fixed by the jury. It is not surprising that one finds difficulty, from a review of the record, in determining how the jury arrived at the amount of logs which it found to have been sorted. We do believe, however, that the jury made a conscientious and painstaking effort to arrive at a correct conclusion, and as it was peculiarly a jury question we see no reason for disturbing its verdict in this respect. At any rate it is clear to us that the plaintiff is not entitled to pay for sorting the entire cut. We think judgment should have been rendered upon the verdict of the jury.

It is further claimed on the part of the appellant that there

was a complete and final settlement between it and the plaintiff in the springs of 1914, 1915, and 1916, and a complete settlement, accord, and satisfaction between these parties in the spring of 1917. It may be conceded that defendant's testimony strongly tends to show these facts. However, the testimony of the plaintiff is in flat denial of a settlement of the items here involved, and the question of whether or not there was a settlement of the matters involved in this litigation was clearly a jury question, which was found against the defendant and cannot be disturbed.

By the Court.—Judgment reversed, and the cause remanded with instructions to reinstate the answer of the jury to the sixteenth question of the special verdict and to render judgment upon such verdict as returned by the jury.

CITY OF MILWAUKEE, Respondent, vs. BECKER, Appellant.

December 14, 1920—January 11, 1921.

Street railways: Ordinance prohibiting deviation of street car from route: Emergency: Delay at railroad crossing.

1. An ordinance of the city of Milwaukee prohibiting a street car on which there were passengers from being diverted from the usual course on the line for which it was designated, unless it is disabled or an emergency renders it impossible to proceed in the usual course, was only intended to prevent arbitrary changes in the running of street cars whereby passengers might be compelled to abandon them before they reached their scheduled destination.
2. Where a street car running on a seven-minute headway was detained nine minutes at a railroad crossing and was overtaken at this point by the following car, there was an emergency preventing the car from proceeding in the usual course, so that a motorman was not guilty of violating such ordinance by turning the car around at the first opportunity after crossing a railroad track, though it had not yet reached the end of its scheduled run; and it makes no substantial difference whether the motorman began his change of route on one side of the railroad track or the other.

3. In this case it is not necessary to decide whether the exclusive control over such matters of service as are covered by the ordinance is now vested in the railroad commission, or whether the orders of the engineer of the commission stationed at Milwaukee are effectual.

APPEAL from a judgment of the municipal court of Milwaukee county: E. T. FAIRCHILD, Acting Judge. *Reversed.*

The defendant was held by the district court of Milwaukee county to have violated an ordinance of the city of *Milwaukee.* A trial *de novo* was had in the municipal court upon appeal and he was again so adjudged.

He was a motorman on the North avenue line of the Milwaukee Electric Railway & Light Company. This line runs from Farwell avenue on the east side to Forty-seventh street on the west side of said city and crosses a number of the north and south lines of the same company.

The ordinance involved is as follows:

"No street car company carrying passengers on street car lines within the city of *Milwaukee,* and no agent, officer or employee of such company shall cause any street car upon which there is a passenger or passengers and which is carded, or otherwise designated, if not carded, for a certain line to terminate its run or to be diverted from the usual course on that line before the same shall have reached the end of the line for which it was carded, or otherwise designated, if not carded, when the passenger or passengers boarded the same; provided, that if any such car, from some physical defect or breakdown, shall become so disabled that it shall be necessary to take the same to a car barn or other place for repairs, or if it shall become necessary, because of an emergency rendering it impossible to proceed in the usual course, to divert any such car from the line for which it was carded, or otherwise designated, if not carded, then this section shall not apply."

The defendant was proceeding with a carload of passengers west on North avenue and on a schedule of about seven minutes headway between cars. On arriving at the tracks of the Chicago, Milwaukee & St. Paul Railway Company, which crossed this line between Thirtieth and Thirty-first

streets, his car was detained nine minutes by reason of the operations of a freight train and switch engine over such crossing. While so waiting, the car following him reached the same point, and after the track was cleared the two proceeded further west. At Thirty-fifth street, his first opportunity to do so west of Thirtieth street, the defendant switched his car and turned back to run eastward instead of continuing the run for which his car was scheduled in due course to the end of the North avenue line at Forty-seventh street. Announcement to that effect was made to the passengers in the car by the conductor, and transfers were offered to such passengers who desired to continue further west, permitting them to continue the journey on the car immediately following. A number of the passengers protested against being compelled to thus transfer, insisting that the defendant should proceed to the end of the run.

The court held that the city of *Milwaukee* had power to legislate on the subject matter in question and that the above quoted ordinance was a reasonable and proper exercise of the police power of said city and that the defendant violated it, and so ordered judgment. From such judgment the defendant has appealed.

For the appellant there was a brief by *Van Dyke, Shaw, Muskat & Van Dyke,* attorneys, and *W. T. Sullivan,* of counsel, all of Milwaukee, and the cause was argued orally by *Mr. Sullivan.*

For the respondent there was a brief by *Clifton Williams,* city attorney, and *Joseph L. Bednarek,* assistant city attorney, and oral argument by *Mr. Bednarek.*

ESCHWEILER, J. Having reached the conclusion that under the proper construction to be given to the ordinance in question, if valid, the facts in this case do not warrant a finding that the defendant violated it, we therefore deem it unnecessary to consider or determine the questions argued by respective counsel as to whether the exclusive control and

jurisdiction over such matters of service is now vested in the railroad commission, and whether, therefore, the city of *Milwaukee* has present power or authority to pass such an ordinance, and whether the oral statements or orders by the engineer of the railroad commission stationed at *Milwaukee* are effectual, and we express no opinion on any of such questions.

The evident purpose of the ordinance quoted above is to prevent any arbitrary changes in the running of the street cars in the city of *Milwaukee* whereby passengers may be compelled to abandon the car before reaching the scheduled destination thereof as indicated to them when entering by the sign or placard on said car. It expressly recognizes that situations may arise and emergencies be created whereby such re-routing becomes necessary and proper.

The street car in question was delayed a period of nine minutes by reason of the blocking at the railroad crossing. If it had continued to Forty-seventh street it could not, under the testimony, without running at a dangerous and unusual rate of speed, have completed its run and then back again eastward without substantial interference with its scheduled and usual time and its usual course of running. To have then proceeded at a proper rate of speed to the end of its line would have created an interval of about seventeen minutes instead of the scheduled seven minutes between cars from at least Thirty-fifth street eastward. From such situation an emergency then existed rendering it impossible for the car to proceed in the usual course, and its diversion, therefore, at Thirty-fifth street was proper and not within the penalty of the ordinance.

The city attorney suggests in his brief that it would have been proper procedure for the motorman, after being delayed five minutes or more at the crossing, to have switched back and started east again at Thirtieth street, where there were also switching facilities, rather than at Thirty-fifth street, because this delay was an emergency rendering it

impossible to proceed in the usual course under the very terms of the ordinance itself. The delay having created an emergency within the exception clause of the ordinance, the mere fact that the change was made at the first crossing west of the obstruction rather than at a crossing east thereof made no such substantial difference as would bring the one re-routing within the penalty clause and the other within the exception clause of the ordinance.

By the Court.—Judgment reversed, and case remanded with directions to dismiss the complaint.

DREHER, Appellant, vs. ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA, Respondent.

December 14, 1920—January 11, 1921.

Insurance: Death by external violence: Evidence: Opinion of expert not based on fact.

1. In an action on an accident policy insuring only against death by external, violent, and accidental means and excepting death from asphyxiation, testimony by three witnesses that they saw a reddish spot on the temple of deceased a short time after his death and an opinion by a physician that a blow had caused the death are insufficient to warrant a finding that death was caused by an external and violent blow and not by asphyxiation from automobile fumes which the evidence showed were present at the time and place of death.
2. The opinion of an expert must be based upon facts, proved or assumed, sufficient to form a basis for the opinion, and cannot be invoked to supply the substantive facts necessary to support the conclusion; so that an opinion by a physician, based only on evidence that witnesses had seen a reddish spot on the temple of deceased, without evidence of any external cause for such spot, that the death of deceased was due to a blow which caused the spot, is not evidence sufficient to take the question to the jury.

APPEAL from a judgment of the circuit court for Milwaukee county: W. R. FOLEY, Judge. *Affirmed.*

Action on an accident insurance policy to recover death

benefits. The defendant is an insurance corporation organized under the laws of Ohio, licensed to do business in Wisconsin and to issue policies of accident insurance. On the 31st day of March, 1902, it issued to one Charles Dreher an accident insurance policy or certificate, under and by virtue of the terms of which the defendant promised to pay to *Josephine F. Dreher,* the plaintiff, $6,300 in case of the death of the said Charles Dreher caused by accident.

On the 17th day of December, 1917, said Charles Dreher and plaintiff were living at Theresa, Wisconsin. They owned a Cadillac touring car, kept in a garage located back of and near their dwelling. They contemplated a trip to Milwaukee the next morning, which was the subject of conversation between them in their back yard. Upon *Mrs. Dreher* telling him that he better get the car ready for their trip he went into the garage, and she into the kitchen of their house for the purpose of preparing lunch. She remained in the kitchen a few minutes and concluded to ask her husband what he wanted for lunch. She went to a window on the side of the garage and called to him, but receiving no response she entered the garage through the door, saw her husband sitting on the fender of the automobile, on the right-hand side, with his head resting on the top of the fender. She touched his shoulder; he looked up and, apparently, tried to speak, but did not. She tried to lift him, but was unable to do so because of his weight. She then called for help, and in a little while two men came and carried him out and laid him on the grass. He was apparently dead at that time. Two doctors, Lengenfeld and Stoye, arrived shortly thereafter. They worked over him for about half an hour in an effort to resuscitate him, but were unable to do so.

When *Mrs. Dreher* entered the garage the engine was running. The hood on the right-hand side of the car was open. One end of a tube for inflating tires was attached to the engine, and he was holding the tube in his right hand. He

had not been in the garage to exceed five minutes when she found him. The two men who carried deceased from the garage testified that it was full of blue smoke that was coming from the exhaust pipe of the engine and that there was considerable odor. One of these men testified that he was affected for a couple of days afterwards by the fumes coming from the engine.

Doctor Stoye filed a death certificate and gave as the cause of death asphyxia, due to the accumulation of gas in the garage while the engine was running. Upon the trial Doctors Lengenfeld and Stoye both testified that in their opinion the cause of death was as stated in the death certificate. *Mrs. Dreher* filed proof of death with the defendant company on October 15, 1917, and gave the cause of death as "overcome by fumes issued from the running automobile engine and, according to the doctor, asphyxia, overcome by fumes of running engine in garage." The company denied liability on the ground that death from such cause was not included in the coverage of the policy.

Upon the trial three witnesses testified that they viewed the body of the deceased in the afternoon of the day of his death and noticed a reddish spot about the size of a twenty-five-cent piece on the right side of his temple. The existence of this spot was denied by the two men who carried him from the garage, the two doctors who were summoned and who endeavored to resuscitate him, as well as by the undertaker.

Doctor Joseph F. Quinn, a practicing physician, in response to a hypothetical question testified that in his opinion the death of the deceased was attributable to the external signs of violence over the temple. In response to a question as to how a mark of that character could be made upon the temple he replied, "By some external violence." Doctor P. F. Gaunt also testified to "reasonable probability that an injury in that location that would produce a mark as described might have produced death." "This mark could

have been caused by external violence, but I would not be willing to say that it was caused by external violence. If it was caused by external violence, such external violence might have caused the death."

The foregoing is the extent of the testimony produced by plaintiff to show that the death was caused by violent, external, and accidental means. At the conclusion of the testimony the court directed a verdict in favor of the defendant. From the judgment entered thereon plaintiff appealed.

For the appellant there was a brief by *William E. Burke* and *Chas. F. Thompson,* both of Milwaukee, and oral argument by *Mr. Burke.*

For the respondent there was a brief by *Robert N. McMynn* of Milwaukee, attorney, and *John A. Millener* of Columbus, Ohio, of counsel; and the cause was argued orally by *Mr. McMynn.*

OWEN, J. The accident insurance policy or certificate upon which the action is based indemnified deceased "against the results of bodily injury hereinafter mentioned effected through external, violent and accidental means, herein termed the accident, which shall be occasioned by the said accident alone and independent of all other causes." Plaintiff forwarded to the company proofs of death on blanks furnished by it, in which it was stated that the death of the deceased was due to "asphyxia, overcome by fumes of running automobile engine." The company denied liability, by reason of the express provision in the certificate that benefits thereunder should not extend to death, disability, or loss resulting from inhaling of gas or asphyxiation (voluntary or involuntary, conscious or unconscious). Without amending the proofs of death or assigning a different reason for the cause of death, plaintiff commenced this action by service of summons on the 16th day of January, 1918. Defendant answered, alleging that deceased met his death as the result of inhaling gas and asphyxiation, and that there

was no external, visible mark of accident upon his body, and that external, violent, and accidental means producing bodily injury were not the proximate, sole, and only cause of the death. Thereafter and on the 19th day of November, 1919, and before the trial of the action, plaintiff attempted to amend the proofs of death by causing to be served upon defendant's attorney a notice signed by her attorney to the effect that "the plaintiff amends the proofs of accident heretofore furnished by her to modify, amplify, correct, and explain them in the particulars pointed out and in conformity with information, data, and material evidentiary facts not within the personal knowledge or recollection of the plaintiff at the time of the making out of said proofs of accident;" and, among other things, it was stated in said notice that the cause of the death of the deceased, which was given in the original proofs of death as asphyxia, overcome by fumes of automobile engine in garage, was amended to read, "blow upon right temple of head." Whether it was so appreciated at the time of the commencement of the action, the plaintiff evidently understood at the time of trial that in order to recover it was necessary for her to prove that the deceased came to his death by reason of external, violent, and accidental means. Her only evidence in support of this fact was the testimony of three witnesses who claimed that they viewed the body of deceased during the afternoon of the day on which he died and that they observed "a reddish or pinkish red spot" on the side of his temple about the size of a twenty-five-cent piece. There was no evidence as to the cause of the spot. There was no evidence that he was struck by anything. There was no fact proven from which it could be inferred that he had sustained a blow on the temple. There was no fact or circumstance connected with the surroundings in which he was found to indicate that he could in any manner have been struck with any object on the side of his head.

It is suggested that the tube used for the inflation of the

tires might have become engaged with the fan, causing the metal gauge on the end thereof to strike the deceased with violence. However, the tube gave no evidence of having come in contact with the fan, and it seems incredible that it could have become entangled therewith without resulting evidence thereof appearing upon the tube. Assuming nothing more than that there was a reddish spot upon his temple three or four hours after his death, Doctor Quinn testified that in his opinion death was due to the external signs of violence over the temple. The court held that this evidence was not sufficient to authorize or support a finding by the jury that the deceased came to his death by violent, external, or accidental means, and directed a verdict in favor of the defendant.

On this appeal plaintiff contends that the evidence above referred to is sufficient to take the case to the jury. If it be conceded that the spot on the temple evidenced external violence, there is nothing to indicate the severity of the blow which caused it. It is a matter of common knowledge that it requires a certain amount of force applied to the temple in order to cause death. There is an entire lack of evidence in this particular. Neither is there evidence of any *post-mortem* conditions from which it may be judged whether he was struck on the temple, or of the force of a blow which he might have received on the temple. The skull was not fractured. There was no evidence of a hemorrhage of the brain, nothing at all except that he was dead and that this red spot was found upon his temple.

The only evidence, therefore, from which it may be inferred that external injury caused the death is the evidence of the doctor that a blow which caused the mark on his temple might have caused death, and that because he was dead it was his opinion that he died as the result of such a blow. The opinion of the physician as to the cause of death is invoked to supply the substantive facts necessary to support his conclusion. This cannot be done. It is the func-

tion of opinion evidence to assist the jury in arriving at a correct conclusion upon a given state of facts. To endow opinion evidence with probative value it must be based on facts proven or assumed, sufficient to enable the expert to form an intelligent opinion. The opinion must be an intelligent and reasonable conclusion based on a given state of facts and be such as reason and experience have shown to be a probable resulting consequence of the facts proved. The basis of the conclusion cannot be deduced or inferred from the conclusion itself. In other words, the opinion of the expert does not constitute proof of the existence of the facts necessary to support the opinion. See *Bucher v. Wis. Cent. R. Co.* 139 Wis. 597, 120 N. W. 518, where many cases are reviewed.

Doctor Quinn may be credited with the expression of his honest opinion concerning the cause of the death of the deceased. His opinion in that respect, however, could be nothing more than mere intuition or conjecture. It had no probative force, because not based on facts which were necessary to give to it that degree of certainty required for the support of verdicts.

It follows that there was no evidence upon which the jury could have found that the death of the deceased was the result of violent, external, and accidental means, and the verdict in favor of the defendant was properly directed.

By the Court.—Judgment affirmed.

ESTATE OF UTTER: REISS, Respondent, vs. UTTER, Executor, Appellant.

December 14, 1920—January 11, 1921.

Executors: Claim against estate: Evidence: Degree of proof required: Instructions.

1. The rule of evidence in civil cases generally is that the jury are required to be convinced or satisfied of the existence of facts by the preponderance of the evidence, though in certain classes of cases a higher degree of proof is required.
2. To support a claim against a decedent's estate by one alleging she had loaned decedent $2,500, it was not necessary that the jury be satisfied by evidence that was clear, convincing, and satisfactory that claimant had made the loan. A mere preponderance of the evidence in favor of claimant is sufficient.
3. Instructions which erroneously placed on claimant a greater burden of proof than the law required were prejudicial.

APPEAL from an order of the circuit court for Milwaukee county: JOHN J. GREGORY, Circuit Judge. *Affirmed.*

Edward W. Spencer, attorney, and *W. H. Churchill,* of counsel, both of Milwaukee, for the appellant.

For the respondent there was a brief by *Curtis, Dorr & Mock* of Milwaukee, and oral argument by *T. H. Dorr.*

JONES, J. In the county court of Milwaukee county a claim was filed for $2,500 against the estate of a deceased person. The case came on appeal to the circuit court, was tried before a jury, and the court submitted one question which was as follows: "Did the claimant, *Ray Reiss,* on February 10 or February 11, 1914, loan to Mary Washburn Utter the sum of $2,500?" The answer was "No." Among other instructions the following were given:

"14. If you are satisfied by evidence that is clear, convincing, and satisfactory that the claimant, *Ray Reiss,* on February 10 or February 11, 1914, loaned to Mary Washburn Utter the sum of $2,500, you will answer the question submitted to you 'Yes.'

"15. If you are not so satisfied, you will answer the question 'No.' "

At the time, the trial judge believed that these instructions were sustained by the case of *Dilger v. McQuade,* 158 Wis. 328, 148 N. W. 1085. On a motion for a new trial the trial judge came to the conclusion that he had been mistaken in applying to the case the rule laid down in the case just cited, since that was not an action on a claim, but in reality a case in equity to establish a lost instrument for the conveyance of realty and to compel specific performance thereof. With commendable frankness the judge admitted the mistake and ordered a new trial. The important question to be decided is whether this was error.

Counsel for appellant cite to sustain their contention 5 Ency. of Ev. 420; 17 Cyc. 778; 1 Moore, Facts, §§ 46, 47, 128, 172; several New York cases; one from Colorado; one from California; and one from Missouri. The Missouri case holds that to sustain claims of this character the plaintiff's allegations must be proved beyond a reasonable doubt. *Craddock v. Jackson* (Mo.) 223 S. W. 924, 929. The New York cases do not state the rule to the full extent of the instructions given, but do declare that the evidence should be "very satisfactory."

It is true that this court in certain classes of cases has approved the rule requiring proof that is clear, convincing, and satisfactory, and in some of the cases the words "beyond all reasonable controversy" are added.

Since this is a question which will often arise we mention some of the cases cited in respondent's brief:

Linde v. Gudden, 109 Wis. 326, 85 N. W. 323, an action to set aside a form of conveyance duly acknowledged; *Larson v. Pederson,* 115 Wis. 191, 91 N. W. 659, to impeach the execution of a duly executed deed; *Citizens Bank v. Jones,* 117 Wis. 446, 94 N. W. 329, to set aside a duly executed mortgage; *Demark v. Milwaukee E. R. & L. Co.*

142 Wis. 624, 126 N. W. 13, to set aside a written release on the ground of fraud or coercion; *Boring v. Ott,* 138 Wis. 260, 119 N. W. 865, restraining in equity a judgment regularly entered after trial in a court of law; *Burnham v. Burnham,* 119 Wis. 509, 97 N. W. 176, to set aside a deed for fraud.

Perhaps the higher degree of proof is most often required where fraud is charged. *Bowe v. Gage,* 127 Wis. 245, 106 N. W. 1074.

Appellant's counsel have cited no case decided by this court where the rule stated in the instructions given to the jury has been approved or declared, and we have found no such case. On the contrary, it is the rule in civil cases generally that the jury are required to be convinced or satisfied of the existence of facts by the preponderance of the evidence. *Brennan v. Healy,* 157 Wis. 37, 145 N. W. 641; *Bowe v. Gage, supra.* But in certain classes of cases, as indicated above, the higher degree of proof is required.

It is earnestly urged that the rule of evidence as laid down in the instructions to the jury ought to prevail to prevent plundering estates. No doubt fraudulent claims are too often filed and such claimants sometimes succeed. On the other hand, the restriction proposed might quite as often cause the defeat of meritorious claims. The statute relating to conversations and transactions between claimants and deceased persons is one important safeguard preventing fraud in this class of cases. But however we may regret it, there can be no statutes or rules of law which will prevent an occasional failure of justice.

The celebrated work of Jeremy Bentham, the Rationale of Judicial Evidence, was published nearly one hundred years ago. Since that time the whole tendency of legislation and judicial decision has been toward the eliminating of many of the restrictions and exclusionary rules of evidence which had grown up in the English courts and which, as he showed, hampered the administration of justice. Prisoners

on trial and parties in civil actions may now testify in their own behalf. The rule excluding witnesses interested in the result, with its infinite complications, has been abolished. Statutes in many of the states have removed many of the common-law disabilities which prevented husband and wife from testifying for or against each other. These are only a few of the many instances which might be given showing the trend of legislation on this subject. In judicial decisions there is also a tendency to allow to the trial judge greater discretion in receiving and excluding evidence so long as well established rules are not violated.

We are not disposed to go counter to the plain tendency of modern legislation and judicial decisions by creating a new exception or restriction for this class of cases, and we hold that the instructions were erroneous.

It is urged that the result would have been the same if correct instructions on the subject had been given, because, it is urged, the testimony is insufficient to support the claim. Several witnesses testified to the delivery of the money by claimant to the deceased, and two witnesses gave testimony from which the jury might have believed that the transaction amounted to a loan rather than payment of a debt. It was plainly a question for the jury.

The instructions related to the vital issue in the case. They placed upon the respondent a greater burden of proof than the law requires, and were clearly prejudicial. *Pennsylvania C. & S. Co. v. Schmidt,* 155 Wis. 242, 144 N. W. 283; *Carle v. Nelson,* 145 Wis. 593, 130 N. W. 467; *Schumacher v. Tuttle P. Co.* 142 Wis. 631, 126 N. W. 46.

By the Court.—Order affirmed.

GREENFIELD, Appellant, vs. MILLER, Respondent.

December 14, 1920—January 11, 1921.

Negligence: Invitor and invitee: Licensor and licensee: Host and guest: Injury to guest by slipping on rug.

1. In cases of invitor and invitee, where the invitor is sought to be made liable for failure to exercise ordinary care to keep and maintain his premises in a safe condition, there must be some mutuality of interest or benefit in order to render the invitor liable.
2. Ordinarily there is no liability on the part of a licensor for injuries sustained by those coming on his premises as mere licensees, unless there is something on the premises in the nature of a trap or the licensor is guilty of active negligence.
3. The relation of licensor and licensee existed where the owner of a new house invited the plaintiff and her husband to spend a holiday as his guests; and there is no liability on the part of the host by reason of the fact that the plaintiff, while walking through the house, slipped on a small rug covering a highly polished floor.

APPEAL from a judgment of the circuit court for Milwaukee county: G. N. RISJORD, Judge. *Affirmed.*

This action was brought to recover damages which plaintiff sustained by falling on the floor in the residence of defendant in the city of Racine. Some time prior to December 31, 1916, the defendant invited the plaintiff and her husband to spend New Year's eve and New Year's day at the home of defendant, which had been recently finished, the floors highly polished and oriental rugs thereon. While walking through the house the plaintiff slipped on a small oriental rug about three and one-half or four feet square and injured her leg.

The plaintiff alleges substantially that on December 31, 1916, she was the guest of the defendant and his wife at their home in Racine; that defendant's residence had been completed a short time prior and the floors were of hardwood, highly polished and slippery; that there was a corridor leading from the living-room to a sun-parlor with hardwood

floor highly polished and very slippery; that the corridor was fifteen feet in length and between three and one-half and four feet wide from wall to wall; and that about three and one-half to four feet from the entrance to said sun-parlor from the corridor are posts or pillars extending out from the walls and reaching from the floor to the ceiling; that those two posts are directly opposite each other and in such a position that they might be used for hanging a door, thus giving the space between the pillars and the sun-parlor a vestibule effect.

That upon the floor of said corridor, between the entrance to the sun-parlor and the two pillars, the defendant had placed an oriental rug four feet square which almost covered the floor, which floor was highly polished and very slippery, and which condition of the floor is not capable of being discovered in the exercise of ordinary care.

That plaintiff in going through the corridor stepped upon the little rug, which gave way under her, causing her to fall, striking her leg upon one of the pillars and causing severe injury.

That it was the duty of the defendant to have warned the plaintiff of the slippery condition of the floor; that it was the duty of the defendant to have secured or fastened the rugs so they would not slip; that the defendant breached and violated this duty to the plaintiff by failing to warn and by failure to securely fasten the rug, and as the proximate result thereof the plaintiff sustained the damages.

Issue was taken on the complaint and a trial had before the court and a jury. At the close of the evidence both parties moved for a directed verdict, the defendant reserving the question of damages for the consideration of the jury in the event that the court should decide in favor of plaintiff.

After arguments of counsel the court below said:

"I cannot see that there is any question for the jury in this case; that there is any proof of negligence on the part

of the defendant. No duty was owing by him, under the circumstances, to warn the plaintiff of the condition of the floor, and that the condition was nearly, if not quite, as well known to the plaintiff as to the defendant, anyway, and that the jury will be, in the morning, at the opening of the session, directed to return a verdict against the plaintiff and for the defendant, because no cause of action."

The court below directed verdict in favor of the defendant and denied appellant's motion for a new trial. In directing verdict the court said:

"Gentlemen of the jury, in this case the opinion of the court is that there is no evidence to go to you on the issues involved here. Without considering the question of whether or not an action of this kind lies between these parties, it does not seem to me that there is anv breach of any duty owing from the defendant to the plaintiff in this case.

"I can see that if it appeared from the evidence that it was usual and customary in the vicinity of the home of the defendant to have rugs of that kind fastened to the floor, and that the defendant had knowledge of that custom or usage, or ought to have knowledge of it, and the plaintiff either did not know anything about the conditions there at the time or assumed that this rug was fastened so as to be reasonably safe, the situation might be entirely different; but that is not this case."

Judgment was entered in favor of the defendant on the directed verdict and against the plaintiff for the costs and disbursements of the action, from which judgment this appeal was taken.

For the appellant there was a brief by *Kaumheimer & Kenney* of Milwaukee, and oral argument by *R. I. Kenney*.

For the respondent there was a brief by *Quarles, Spence & Quarles,* attorneys, and *Arthur B. Doe,* of counsel, all of Milwaukee; and the cause was argued orally by *Mr. Doe.*

KERWIN, J. The issues involved upon this appeal are (1) whether the court below erred in directing a verdict for the defendant, and (2) whether error was committed in denying appellant's motion for a new trial.

The theory of counsel for appellant is that the duty owing by the defendant to the plaintiff upon the facts in this case is that of ordinary care, and that under this rule it was the duty of the defendant to render the premises reasonably safe for the visit of his guests.

The material allegations in the complaint which are the basis of plaintiff's cause of action are set out in the statement of facts heretofore set forth and need not be repeated. Obviously the court below had in mind the rule of law that under the facts in the case the relation existing between the plaintiff and defendant was that of licensor and licensee, and hence the plaintiff took the premises in the condition in which she found them.

It is quite obvious from the argument of counsel for appellant in their brief as well as from some of the cases cited that they seek to bring the instant case within the legal definition of invitor and invitee, or cases of licensor and licensee, where a liability existed because of a trap left on the premises by the licensor or active negligence on his part.

Gorr v. Mittlestaedt, 96 Wis. 296, 71 N. W. 656, is a case holding that where a private driveway, twelve feet wide, with well defined boundaries, is situated over twenty feet from a cellar, the intervening space being occupied by a grass plot and piles of stone extending from the ends of the cellar nearly to the driveway, the owner of the premises is not liable for injuries received by a person traveling on the driveway by invitation, whose horse became unmanageable and caused the carriage to wholly leave the driveway and pass over the grass plot to the cellar.

Lehman v. Amsterdam C. Co. 146 Wis. 213, 131 N. W. 362, is a case where plaintiff was injured by falling into an open stairway in defendant's store. The court held that where the customer was invited to the very verge of the opening for the purpose of examining goods on the shelves and was left there without warning while her mind was occupied with this purpose, it could not say as a matter of

law that she was guilty of contributory negligence in failing to see it, and that it was a question for the jury.

In *Shaw v. Ogden,* 214 Mass. 475, 102 N. E. 61, the driver of a delivery wagon, passing by implied invitation through a private driveway, struck the limb of a tree with the top of the wagon. The owner of the driveway was held not liable.

In *Marston v. Reynolds,* 211 Mass. 590, 98 N. E. 601, where a person inspecting a house to rent fell eighteen feet off a dark platform into a basement, the owner was held liable.

In *Hamilton v. Taylor,* 195 Mass. 68, 80 N. E. 592, an iceman carrying ice across a passageway fell into an elevator well, there being no warning that the well was open. It was held that there was an implied invitation to enter with the ice, and the owner was held liable.

Flood v. Pabst B. Co. 158 Wis. 626, 149 N. W. 489, is clearly distinguishable, as will readily be seen by an examination of the case.

It will be seen that in the cases of invitor and invitee there must be some benefit to the invitor in order to render him liable for failure to exercise ordinary care; there must be some mutuality of interest; and if the interest be only such as concerns the person entering, then he is but a mere licensee and there is no implied invitation. But the legal distinction between implied invitor and invitee and a mere licensor and licensee is quite well marked in the decisions, the general rule being that there is no liability on the part of the licensor for injury sustained by those coming on his premises as mere licensees, unless there is something on the premises in the nature of a trap which fact proximately caused the injury, or the licensor was guilty of active negligence.

In Bigelow, Torts (8th ed.) 160, 161, it is said:

"If the licensee is invited only as a guest or friendly visitor or for benevolence, he enters on no better footing,

as far as the present question is concerned, than if he were a bare licensee; he cannot hold the owner or occupant to any duty of care or diligence beyond giving notice of any danger of which he is aware."

There seems to be a great dearth of authority on the subject of the doctrine of licensor and licensee as applied between host and guest. The case of *Southcote v. Stanley,* 1 H. & N. 247, appears to be the leading case upon the subject and has been quoted with approval in other cases.

It is true there are some cases holding that if the invitation to enter premises be actual it creates of itself a duty to have the premises in fit condition for the purpose so far as might be by due care or diligence, and such cases are sometimes regarded as limitations or exceptions to the general rule, as in the English case above cited, where the licensee is invited only as a guest or friendly visitor or for benevolence. He stands on no better footing than the bare licensee and must take the premises as he finds them, subject, however, to the limitation that the licensor must not set a trap or be guilty of active negligence which contributed to the injury.

It is difficult to lay down any general rule on the subject as applicable to all cases. The facts in each case, including the nature of the invitation, must be considered. Bigelow, Torts (8th ed.) 161, 162; *Hupfer v. Nat. D. Co.* 114 Wis. 279, 90 N. W. 191.

The doctrine is well stated in *Plummer v. Dill,* 156 Mass. 426, 31 N. E. 128, as follows:

"It is held in England that one who comes on an express invitation to enjoy hospitality as a guest must take the house as he finds it; and that his right to recover for an injury growing out of dangers on the premises is no greater than that of a mere licensee. *Southcote v. Stanley,* 1 H. & N. 247. The principle of the decision seems to be that a guest, who is receiving the gratuitous favors of another, has no such relation to him as to create a duty to make the place where hospitality is tendered safer or better than it is. It is well settled there that to come under an implied invita-

tion, as distinguished from a mere license, the visitor must come for a purpose connected with the business in which the occupant is engaged, or which he permits to be carried on there. There must at least be some mutuality of interest in the subject to which the visitor's business relates, although the particular thing which is the object of the visit may not be for the benefit of the occupant. Pollock, Torts, 417; *Holmes v. North Eastern Ry.* L. R. 4 Exch. 254; *S. C.* L. R. 6 Exch. 123; *White v. France,* 2 C. P. Div. 308; *Burchell v. Hickisson,* 50 L. J. Q. B. 101."

The doctrine of licensor and licensee applies also where one invites another to ride with him in his conveyance, where the person invited to ride is a gratuitous passenger. *Patnode v. Foote,* 153 App. Div. 494, 138 N. Y. Supp. 221; *Pigeon v. Lane,* 80 Conn. 237, 67 Atl. 886; *Beard v. Klusmeier,* 158 Ky. 153, 164 S. W. 319; *Mayberry v. Sivey,* 18 Kan. 291.

Of course in the class of cases last above mentioned it must appear that the licensor was not guilty of any wilful act of negligence or any new danger created by the licensor. As stated in other cases, where the relation of licensor and licensee exists, the licensee can only recover for setting a trap or for active negligence.

The court is of opinion that in the instant case the relation of licensor and licensee, under the allegations of the complaint, existed under the general rule that where a guest is invited to come into the premises of the host for social or benevolent purposes only, the relation thus created is one of licensor and licensee and the rule of ordinary care does not apply.

The question then arises in this case, under the allegations of the complaint, whether, if it were established that it was the custom in the vicinity of Racine to have oriental rugs fastened and the defendant knew this and failed to notify the plaintiff, and plaintiff was ignorant of the fact, there could be a recovery. This proposition it is not necessary to decide in the view we take of the present case, because

there was no sufficient evidence of a general custom. The only witness offered to testify to a custom in Racine stated that he was not personally familiar with the laying of rugs in that city. Therefore his testimony was properly excluded. No other evidence on that subject was offered, hence there is no basis for the claim in the complaint that defendant was negligent in the respect mentioned, namely, failing to notify plaintiff that the rugs were not fastened. It follows, therefore, that the purely social relationship in the case at bar raised no duty on the part of the host to exercise care or make the premises more safe, and that the relationship of host and guest, under the circumstances, was equivalent to the legal relationship of licensor and licensee and not equivalent to the legal relationship of invitor and invitee.

We are satisfied that no prejudicial error was committed by the court below and that the judgment is right and should be affirmed.

By the Court.—The judgment of the court below is affirmed.

SOMMERFELD, Respondent, vs. CHICAGO, NORTH SHORE & MILWAUKEE RAILROAD, Appellant.

December 15, 1920—January 11, 1921.

Carriers: Interurban railroads: Negligence: Res ipsa loquitur: Passenger injured by breaking of window.

1. A presumption of negligence is indulged in cases where the facts and circumstances show that an accident could not have happened if the defendant had used ordinary care; but in this case, which is to recover damages for injuries received by a passenger on an interurban car when a window suddenly broke, this doctrine does not apply, because the evidence does not sustain the conclusion that the breaking of the window was caused by defendant's negligence in furnishing a defective window, rather than some unknown cause, such as the window being struck by an object from the outside.

2. Where under the evidence it was a matter of speculation and conjecture as to whether the window was broken by a stone thrown at the train or as the result of the negligence of the railroad company in furnishing defective window glass or an imperfect frame, or in negligently fitting the glass into the sash, the passenger could not recover, the doctrine of *res ipsa loquitur* being inapplicable.

APPEAL from a judgment of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Reversed.*

This action, originally tried in the civil court of Milwaukee county, OTTO H. BREIDENBACH, judge presiding, was brought for personal injuries sustained by plaintiff from glass projected into the car by the breaking of a window while he was traveling as a passenger on defendant's car. The complaint charges negligence as follows: (1) that the car and windows were negligently constructed and of inferior material; (2) that the car and windows were negligently permitted to become out of repair and in a defective and dangerous condition; (3) that the car was operated negligently and at a dangerous and excessive speed. The answer denies negligence.

In the civil court a special verdict was rendered in favor of the plaintiff, damages being fixed in the sum of $545. Defendant appealed to the circuit court, where the judgment of the civil court was affirmed. This is an appeal from such judgment.

For the appellant there was a brief by *Edgar L. Wood* of Milwaukee, attorney, and *A. L. Gardner* of Chicago, of counsel; and the cause was argued orally by *Mr. Wood.*

Thomas F. Hayden of Milwaukee, for the respondent.

SIEBECKER, C. J. It appears that the plaintiff was seated near the window in one of defendant's cars composing the interurban train on its way from Lake Bluff, Illinois, to the city of Milwaukee, Wisconsin; that while the train was going at the rate of about fifty miles per hour the glass of the window suddenly broke, causing small particles of glass

to cut his face and enter both of his eyes, which seriously injured him. Some of the particles and pieces of glass flew across the car, reaching the seat on the side of the car opposite the one occupied by plaintiff. Other pieces of glass were scattered in the area near his seat. The break in the window glass is described as one in the form of a hole in the upper left-hand corner of the window. The plaintiff testifies in effect that the glass suddenly started cracking and crystallizing and showered glass in his face. Others who observed the accident testified that at the starting point of the break it looked like a crescent-shaped hole and that the cracks in the glass spread from the hole. It is manifest that at the point where the break started it left a hole and that the glass from this hole flew in small particles into plaintiff's face and eyes and was driven across the car, and that other parts of the window glass cracked and broke into larger pieces and were scattered about the floor of the car. Upon search no stone or other missile was found in the car to indicate that any such object had come through the window. There is some evidence tending to show that glass in a car window like this one may break from imperfections in the glass or from imperfect setting of the glass into the frame holding it, but there is no evidence to show that any of these imperfections or defects had been observed by any person in the pane of glass or the window in question. The evidence is in conflict as to whether boys were on or near the right of way of the company and whether they were engaged in throwing missiles at the moving train.

The jury found that the window was not broken by an object from the outside; that the defendant failed to exercise ordinary care as regards the condition of the window before it broke on this occasion; and that such want of ordinary care by defendant proximately caused the plaintiff's injury. These findings are excepted to on the ground that the evidence does not sustain the verdict. The circuit court held that the verdict is sustained by the evidence.

It is the claim of the defendant that the evidence conclusively shows that the window was broken by some object from the outside. The facts testified to by the witnesses who observed the break in the glass and who saw the particles of glass like those that were thrown into plaintiff's face and eyes and cast across the interior of the car tend to show that the force which caused the break operated in all respects as a sharp blow operates when the surface of glass is struck. The broken particles of glass were driven into the car as a blow from the outside would drive them; the glass knocked out of the hole on the upper left-hand corner was reduced to small particles such as would result from a swift, severe blow from an outside object; the hole produced in the glass was one which is produced in glass like this when struck by a swift missile like a bullet fired from a firearm, and the cracks in the glass radiating from this hole as a center indicated that they resulted from the force that made its impact on the glass at the point where the hole was found. All of these facts indicate the uncertainty of the cause that produced the break of the glass. Considering these facts in connection with the claim of the plaintiff that some defect in the glass or in the manner in which it was framed into the sash must have caused it to break in the manner it did, it is apparent that the actual cause of this accident is not established with any reasonable certainty. A searching study of all the facts and circumstances of the case persuades us that the jury's finding that the window was not broken by being struck by some object from the outside is the merest conjecture and speculation. The evidence furnishes no reasonable basis for drawing this inference, and the jury must of necessity have been led by mere speculation in arriving at their finding. The physical facts and conditions as disclosed by the testimony are such as to suggest a probability that some blow by an outside object caused the break, yet there is not sufficient certainty in this

evidence to support this conclusion. The trial and circuit courts were of the view that the doctrine of *res ipsa loquitur* is applicable to the case, and that the facts and circumstances proven established a *prima facie* case of defendant's negligence. A presumption of negligence is indulged in cases of this class where the facts and circumstances show that the accident could not have happened if the defendant had used ordinary care in the discharge of the duties imposed on it in its relation to the plaintiff.

In *Cummings v. Nat. F. Co.* 60 Wis. 603, 18 N. W. 742, 20 N. W. 665, this court phrased the rule as follows:

"When the thing is shown to be under the management of the defendant or his servants, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care." See, also, *Clemons v. C., St. P., M. & O. R. Co.* 137 Wis. 387, 119 N. W. 102; *Adams v. Bucyrus Co.* 155 Wis. 70, 143 N. W. 1027.

The vice of the claim that this doctrine is applicable to this case arises from the fact that the lower courts regarded the jury's finding under question No. 1 as establishing that the accident was not caused by anything other than defendant's negligence in furnishing a defective window glass, an imperfect frame, or negligently fitting the glass into the sash. This claim must fail because the evidence does not sustain this conclusion. Some unknown cause may have produced the break in the glass which was wholly unrelated to defendant's duty to furnish a proper glass and place it in a reasonably sufficient sash in an ordinarily careful manner. It is considered that under the facts and circumstances shown the doctrine of *res ipsa loquitur* does not apply to this case.

It follows from the foregoing considerations that the evidence adduced does not support the conclusion that the defendant is guilty of the negligence charged in the com-

plaint, and that the trial court erroneously awarded judgment on the verdict.

By the Court.—The judgment appealed from is reversed, and the cause remanded with direction to award judgment dismissing plaintiff's complaint.

WILL OF HOYA.

December 15, 1920—January 11, 1921.

Executors: Purchases of real estate by executor: Void or voidable sales: Liability for profits: Legatee with notice of proceedings: Subsequent attack: Executor indebted to decedent at time of appointment: Obligations barred by the statute of limitations.

1. Although sec. 3914, Stats. (providing that an executor shall not directly or indirectly purchase or be interested in the purchase of any part of real estate sold by him), declares sales made contrary to such provision shall be void, such sales are voidable only, and an action to set the same aside must be brought within the five-year period fixed by sec. 3918.
2. Where a residuary legatee, through his attorneys, had notice that the executor had purchased real estate of the estate, but acquiesced in the approval of the sale by the county court, he cannot, after final settlement, attack the purchase on appeal to the circuit court.
3. Where an executor purchased real property of the estate and made a profit, he may be compelled as trustee to account therefor.
4. One accepting such a trust as executor becomes thereby chargeable in some way with existing obligations which he owes to the estate he undertakes to administer.
5. The running of the statute of limitations absolutely extinguishes the cause of action, such statutes in this state not being treated as statutes of repose; hence one who becomes an executor of a decedent's estate does not thereby become chargeable with debts which he owed testatrix but which were barred by the statute.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Reversed.*

In 1896 one Ferdinand Hoya, Sr., of Milwaukee, died

testate, his wife, Agnes Hoya, being the sole beneficiary. Proceedings were started to probate his estate, but no final decree was entered therein, all parties concerned treating the real and personal property as belonging to the widow. October 31st of the same year the widow made her will appointing her two sons, *Ferdinand A. Hoya,* appellant here, and William C. Hoya, executors. She gave to each of the sons a specific legacy of $5,500 and provided that the residue should be divided equally between the two sons and a grandson, *Otto F. E. Hoya,* respondent here. The two sons received during the widowhood of the mother various and substantial sums of money from her.

In 1908 William C. Hoya, who before then had been engaged in several business enterprises, went through bankruptcy proceedings and made a composition with his creditors, the money to pay which was advanced by his mother.

January 27, 1912, Mrs. Agnes Hoya died and her will was admitted to probate on March 21st of the same year, after objections had been interposed to the appointment of *Ferdinand* as executor by the respondent and others, and a special administrator was appointed.

In July, 1913, an inventory and appraisal was filed with a verification by the said *Ferdinand A. Hoya* as surviving executor. It showed as real estate the premises which had been used and occupied by the deceased as a homestead and the value thereof was appraised at $6,150. Scheduled as personal property were the following items:

(1) Claim against the estate of William C. Hoya of four items of loans in 1908 aggregating $8,300 and with accrued interest of $1,641.77; (2) cash received from the special administrator of $507.53; (3) a mortgage by one Hintz with accrued interest of $684.94; (4) a note of one Stecker with accrued interest of $208.13; which several items were appraised at the stated amounts.

The following items, each of which was stated by the executor to be outlawed and each appraised as worthless by the appraisers: (a) A check of *Ferdinand A. Hoya;* Decem-

ber 12, 1898, payable to Agnes Hoya, executrix, $300; (b) note of *Ferdinand A. Hoya*, May 4, 1900, for $767, payable in one year, with interest at seven per cent., with the indorsement thereon of interest paid to August 4, 1900; (c) note of August 18, 1900, in the sum of $200, payable in six months, seven per cent. interest; (d) note of same, July 16, 1904, for $600, payable in three months, at seven per cent. interest.

There are also scheduled an item for a gold watch and chain of the value $100, household furniture and wearing apparel $177, a $500 note which had long been outlawed and the maker whereof had gone through voluntary assignment, a deposit of $11.13 in the First National Bank, and in the Germania Bank of $23.87; and cash on hand fifty cents.

On July 12, 1913, the executor filed an interlocutory account showing the receipt of $507.53 from the special administrator and the payment of the principal of the Hintz mortgage of $200 with interest, and the two bank deposits and three other small items.

The disbursements included a number of items of alleged payments to himself for repairs and improvements to the homestead and for taxes on the same; the amount of the disbursements aggregating at that time $491.64.

In April, 1914, *Ferdinand A. Hoya* filed a petition in the county court stating in substance that the present estate is insufficient to pay the legacies, debts, costs of administration, and the inheritance taxes; setting forth the situation as to the claim scheduled in the inventory as against the estate of William C. Hoya and that it was being contested in the estate of said deceased brother, and if collectible would have to be offset against the legacy of $5,500 provided for in the will of Agnes Hoya; that there were claims against the estate of upwards of $2,000. It then described the real estate in question and that the same had been appraised at $6,150. The petition was silent as to the fact of these premises having been described in the inventory as a homestead.

Upon such petition an order for a hearing was granted and requiring service of notice thereof on all the parties interested.

It appeared from a recital in the sheriff's certificate filed with his return as to the service of such notice that the respondent grandson, *Otto F. E. Hoya,* could not be found and was a resident of Berlin, Germany. Admission of service of a copy of such order, however, was made by attorneys representing *Otto F. E. Hoya.* The oath of such executor to make such sale and the usual form of bond in the sum of $7,500 were filed and approved.

July 8, 1914, an order for the sale was made reciting, among other things, that due notice had been given for the hearing of the petition and that appearance was made for the executor and on behalf of such petition and no one appeared to oppose, and thereupon the executor was licensed and authorized to sell such real estate in the usual manner and after an appraisal should be had thereon.

On October 5, 1914, an inventory on such sale was filed and the same premises were now appraised at $4,250 by the same appraisers who had fixed its value in the inventory of July, 1913, at $6,150.

October 7, 1914, the executor filed his report of sale reciting, among other things, that one George L. Henes had bid $4,000 and *Ferdinand A. Hoya* bid $4,250 for said property and it was then struck off and sold to *Ferdinand A. Hoya* as the highest and best bidder. Due service of the notice of sale was admitted in September, 1914, by the attorneys for respondent, *Otto F. E. Hoya.*

Notice was made and served on the same attorneys of the application of the executor for an order confirming the sale, and on November 27, 1914, an order was made confirming such sale, reciting that due notice had been given of such application to all persons interested and no person appeared to oppose confirmation, and that it appeared to the court that the said sale was legally made and fairly conducted and that the sum of $4,250 is not disproportionate of the value of

said real estate, and thereupon confirmed the same and directed the executor to execute and deliver a deed to the purchaser.

A claim was interposed by *Ferdinand A. Hoya* as surviving executor of his mother's estate against the estate of his brother, William C. Hoya, on account of the four several items aggregating $8,500, together with interest above mentioned. Objections were interposed to said claims by the administratrix of the estate of William C. Hoya, and upon a hearing had the county court decided on June 22, 1914, that of said claim $2,760 should be disallowed and $3,200, together with a contingent claim of $200 with interest, allowed, and judgment in accordance therewith was filed in the county court June 30, 1914.

December 4, 1914, *Ferdinand A. Hoya* filed his verified account and petition for the examination and allowance thereof and of the account theretofore filed by him and for the determination and adjudication of the inheritance tax. It showed in the items of receipts a charge against the executor for rent for the real estate at $20 per month, the amount of $4,250 realized on the sale, and an item of $3,400 as being due from the estate of William C. Hoya. Objections were interposed to this account so filed with reference to the charges on account of repairs to the homestead and the alleged rental thereof and on the ground that the executor had omitted to account for all the property belonging to the deceased. A hearing was had upon the objections, and the court found that the real estate constituted the homestead of the deceased; that the executor had converted to his own use the household furniture, wearing apparel, and gold watch and chain, and adjudged that the real estate was not subject to the payment of the claims filed in the estate; that the executor was not required to charge himself with rents collected from the homestead and not entitled to credit for any items of repairs, management, and up-keep of the same; disallowed certain items of the account as to the

payment of premiums on bonds and disallowed certain other items not material here, and then surcharged the executor's account and directed a payment to be made *pro rata* upon the claims filed. On December 3, 1917, an order was made directing the payment of a 26.4 per cent. dividend to the respective claimants. It appears that such payments were made.

May 27, 1918, a final order of the county court was made and entered determining in substance that the executor had fully administered the estate; that there remained in his hands the proceeds from the sale of the homestead, namely, $4,250, which amount is not subject to the claims of the creditors; that the creditors had been paid a final dividend; that William C. Hoya was indebted to the estate in the sum of $3,400; that the real estate had theretofore been sold by order of the court, and then, pursuant to the terms of the last will of said deceased, the court decreed distribution of the personal property, to *Ferdinand A. Hoya* $3,825, to the legal representatives of the estate of William C. Hoya $425, which amounts make up the proceeds of the sale of the homestead.

On the same day, it appearing that the executor had filed receipts for the payments so ordered, the decree was made absolute, the executor discharged and his bond canceled.

From such order the grandson and residuary legatee appealed to the circuit court. Upon hearing there had the circuit court made his findings of fact and conclusions of law.

In addition to many of the facts above recited, about which there was no dispute, he also found in substance as follows:

That *Ferdinand A. Hoya* has had continuous possession of the homestead from the time of the death of his mother, and the reasonable rental value is $50 per month, amounting to about $4,800; that *Ferdinand* as executor neglected to close the estate within a reasonable time, for which no reason is given, and that he continued to delay the final

settlement of the estate for his selfish and fraudulent purposes and to the injury of others interested in said estate; that the estate of which Agnes Hoya came into possession upon the death of her husband amounted approximately to $40,000.

That at the time of the death of William C. Hoya, co-executor, he was indebted to the estate of his mother in the sum of at least $15,000, no part of which has been paid.

That *Ferdinand A. Hoya* at the death of his mother was indebted to her in the sum of at "least $13,000, which includes the principal and interest on amounts loaned and advanced as disclosed in the testimony and record herein, including the rent of homestead, with which he should be charged."

That by reason of his fraudulent conduct in the management of the estate he is not entitled to any compensation.

That the relations existing between *Ferdinand A. Hoya* and his mother, who was eighty-three years of age at her death, were of a very confidential nature and permitted and furnished to *Ferdinand A. Hoya* opportunity to accomplish his unlawful purposes, and that the mother depended to a large extent upon her son *Ferdinand* to carry on her ordinary business transactions, and "the disposition of said *Ferdinand A. Hoya* to accomplish his illicit purpose to the injury of co-devisees and creditors is fully established."

That the executor showed a persistent disregard of the rights of others interested in the estate in his management thereof and also a purpose to convert it to his own use.

That he neglected to schedule in his inventory various items of assets belonging to said estate until compelled to do so by order of the county court.

That after the attempted purchase of the homestead the said *Ferdinand A. Hoya* incumbered the property with a mortgage of $6,000 to the Bohemian Building & Loan Association of the city of Milwaukee and subsequent thereto transferred the property to his wife, who now holds the legal title.

"That the only tangible assets left by the said Agnes Hoya at her death was the said homestead as herein described, and that the said homestead was of the reasonable value of $7,000, and that it was a fraud upon the said estate and upon the creditors of said estate by the executor to attempt to dispose of said homestead, as was done by him in this matter, for the sum of $4,250."

"That the action of the executor in causing an inventory to be filed showing the value of the said real estate to be $4,250, whereas in truth and in fact its value was equal to, if not in excess of, $7,000, was a fraud upon the estate and all parties interested therein, and was done by said executor for the sole purpose of accomplishing his fraudulent purpose of securing for himself, to the exclusion of all others interested, the balance of said estate."

As conclusions of law the court held as follows:

(1) The final decree of the county court is vacated.

(2) That the attempted sale of the homestead to himself was fraudulent and void under and by virtue of sec. 3914, Stats., and is vacated, "and the said homestead or the proceeds thereof are hereby adjudged and decreed to be and constitute assets of said estate not yet administered."

(3) "That the indebtedness of *Ferdinand A. Hoya* to the estate of Agnes Hoya, amounting to approximately $13,000, upon his acceptance of the trust as executor . . . became and was assets in his hands owned by said estate and for which, as such executor, he was liable to account.

(4) "That the indebtedness of the said William C. Hoya to the estate of Agnes Hoya, amounting to approximately $15,000, upon his acceptance of the trust as executor . . . became and was assets in his hands belonging to said estate for which he was liable to account.

(5) "That the settlement and allowance by the county court of the final decree . . . under date of May 27, 1918, was erroneous and void and the same is hereby vacated and set aside.

(6) "That the attempted sale of the real estate of the said Agnes Hoya, deceased, being void in law, the title thereto remained in said estate and constitutes assets thereof unadministered and subject to further administration proceedings."

(7) That the objections filed against the executor's final accounts, which objections were adopted by the appellant (*Otto F. E. Hoya*), are fully sustained and the executor's final accounts and the decree allowing the same are vacated and set aside and the said matter is hereby remanded to the county court for further proceedings according to law.

(8) "That no statutory bar of limitation of action or discharge in bankruptcy applies to indebtedness of an executor to his estate, and such indebtedness upon his appoint-

ment and qualification constitutes assets in his hands belonging to the estate and for which he must account."

From the judgment entered in accordance therewith the executor, *Ferdinand A. Hoya,* has appealed to this court.

For the appellant there was a brief by *Schmitz, Wild & Gross* of Milwaukee, and oral argument by *Robert E. Wild* and *E. J. Gross.*

Andrew Gilbertson of Milwaukee, for the respondent.

ESCHWEILER, J. Many of the details of appellant's administration of his mother's estate we have not deemed it necessary to set forth in the statement of facts. The whole record, however, showing the manner in which the appellant as executor conducted his trust, presents a very unpleasant picture and well deserved the condemnation which it repeatedly received in the county court as well as that expressed so vigorously in the findings of the circuit court.

Three separate questions are presented on this appeal: First, Can the respondent *Otto F. E. Hoya,* grandson and beneficiary of the deceased, be now permitted to attack and set aside the sale of the homestead by the executor to himself in October, 1914? Second, Were the obligations of *Ferdinand C. Hoya* arising from the loans to him by his mother, and against which the statute of limitations had run at the time of her death, chargeable against him as assets of the estate upon his assuming to act as executor? and thirdly, Should the amount of the indebtedness of the co-executor, William C. Hoya, to the estate of his mother be increased herein over the amount fixed by the same county court in the hearing upon the claim filed by the appellant here as executor of his mother's estate against the estate of said William C. Hoya?

The circuit court held that the sale of the homestead in October, 1914, the details of which are set forth in the statement of facts, was void under sec. 3914, Stats. This statute provides, in substance, that an executor shall not

directly or indirectly purchase or be interested in the purchase of any part of the real estate sold by him, and "all sales made contrary to the provisions of this section shall be void."

The literal language of this last quoted clause of sec. 3914, Stats., has, however, been restricted in that the word "void" as it there appears must be construed to mean voidable; and that an executor so purchasing may nevertheless have and convey good title to third persons unless and except such sale be set aside either by proper objections to the confirmation thereof or by a direct action. The latter, as is provided in sec. 3918, Stats., must be brought within five years from the sale. That this meaning and effect must be given to said sec. 3914 has been repeatedly held. *Melms v. Pabst B. Co.* 93 Wis. 153 (66 N. W. 518) at p. 164; *Gibson v. Gibson,* 102 Wis. 501, 506, 78 N. W. 917; *Keilly v. Severson,* 149 Wis. 251, 255, 135 N. W. 875. See, also, notes in L. R. A. 1918B, 15, 29, 41.

At the time of the decree in the circuit court more than five years had elapsed since the making of the sale. In August, 1917, the executor had sold the property to one Gottschalk and he in turn to Mrs. Hoya, wife of the executor. In the following month she mortgaged the property to a building and loan association. Neither she nor the mortgagee was a party to this proceeding, and no action, up to the time of the entry of the decree herein, had been brought against them. The title, therefore, to this real estate had by the lapse of time vested in the purchaser. Sec. 3918, Stats.; *Turner v. Scheiber,* 89 Wis. 1, 6, 61 N. W. 280; *Keilly v. Severson,* 149 Wis. 251, 255, 135 N. W. 875.

There is a further reason why the respondent here, *Otto F. E. Hoya,* cannot be permitted to now attack the sale of the homestead. He, through his attorneys, received notice of all the proceedings with relation to said sale. The report of the sale showed that the property had been purchased by

the executor himself. Upon the hearing of the executor's petition to confirm such sale, the respondent, having had due notice thereof, made no opposition to the same and took no further steps whatsoever with reference thereto or the confirmation thereof until he attempted by his appeal from the final decree of the county court of May, 1918, to raise the same questions thus passed over. He had his day in court upon such sale when the sale proceedings were before the court and is bound thereby.

Though the title be confirmed, as we have seen it must be under the sale, the executor may nevertheless be held accountable for any profits that he may have made out of the transaction, on the ground that when a trustee deals with trust property to his own advantage any profit accruing therefrom may be held to be for the benefit of the *cestui que trust*. *McClear v. Root,* 147 Wis. 60, 64, 132 N. W. 539. There is no finding here, however, of any profits out of the transaction, nor evidence that would support such a finding if made. The difference between the appraisal valuation in the inventory of July, 1913, and that made for the purpose of the sale in October, 1914, is explained by the testimony of the appraisers making the two appraisals, and there is nothing in the record that impeaches that testimony.

It follows, therefore, that so far as the disposition of the homestead is concerned the decree of the circuit court must be reversed and that of the county court affirmed.

The indebtedness of *Ferdinand A. Hoya* to his mother as scheduled in the inventory filed by him was made up of several items, each of which was marked "outlawed" by him and appraised as worthless by the appraisers, and were obligations upon which the statute of limitations had run at the time of his mother's death.

There is no question raised here as to the general rule that a person accepting such a trust as executor becomes thereby chargeable in some way with existing obligations of

his to the estate he undertakes to administer. *Wis. Trust Co. v. Cousins,* 172 Wis. 486, 179 N. W. 801, 808.

There is a conflict of authorities as to whether or not the same rule applies as to obligations against which a statute of limitations had run during the lifetime of the testator. The line of authorities holding that the statute of limitations does not bar the application of such general rule is in those jurisdictions wherein the statute of limitations is considered merely a statute of repose, applying to the remedy only, while the contrary view is maintained where it is considered that the statute of limitations destroys the right of action itself and gives rise to a new property right in the debtor. This latter view as to the statute of limitations has been repeatedly asserted by this court although such view is deemed to be contrary to that of many of the sister states and of the United States supreme court. *Hite v. Keene,* 149 Wis. 207, 213, 134 N. W. 383, 135 N. W. 354; *Laffitte v. Superior,* 142 Wis. 73, 84, 125 N. W. 105; *Eingartner v. Ill. S. Co.* 103 Wis. 373, 378, 79 N. W. 433. Many of the authorities on this question are found in L. R. A. 1918B, 619, and 1 A. L. R. 987.

Being committed, therefore, to the doctrine that upon the running of the statute the cause of action is extinguished and a new right comes into existence in favor of the debtor, of equal value in the eye of the law as was the former right to the cause of action, we feel compelled to now hold that an obligation barred by the statute of limitations at the death of the testator is not to be charged as against the debtor upon his assuming the duty of executor of the estate of such testator.

We can see no ground upon which it can be held that when the county court, in the matter of the estate of William C. Hoya, passed upon the indebtedness of William C. Hoya to his mother's estate as presented upon the issue made by the filing of the claim by the appellant here as

executor and the objections thereto by the administratrix of William's estate, and fixed the amount at $3,400, it can, by these proceedings in the mother's estate, wherein the administratrix of the estate of William is in no manner a party, be determined to be $15,000. As between the estate of Agnes Hoya and the estate of William C. Hoya, the place to determine the liability of William was in the administration of his estate. The determination there stands unimpeached in this record and is binding and conclusive.

It follows therefrom that the judgment of the circuit court setting aside the decree of the county court must be reversed and that of the county court affirmed.

By the Court.—Judgment reversed, and cause remanded with directions to affirm the judgment of the county court.

WILL OF DEVER.

December 15, 1920—January 11, 1921.

Wills: Construction: Intent of testator: Ambiguity: Extrinsic evidence: Bequest "in trust" as vesting absolute ownership.

1. In construing a will the constant effort of courts is to ascertain and give effect to the intention of the testator.
2. Where testator, after making certain devises in his will, gave the residue of his estate to certain named persons *in trust,* and said no more, an ambiguity as to whether he intended a trust in the true legal sense arises, and to resolve such ambiguity the court may consider the extent of the estate, testator's family relations, his attitude towards his next of kin, and his relations with those claimed to be his beneficiaries under that clause of the will where the expression "in trust" occurs.
3. Under the circumstances—testator being an uneducated man, having as his only relatives an aged aunt in a distant state and two cousins, with none of whom he had been particularly intimate and for whom he had made generous provision in the will, and the persons named as residuary legatees being his daily associates, who had extended to him their friendship and the hospitality of their homes, and the fact that the testator in drawing his will had before him the will of his

deceased brother which he used as a form and which contained trust features none of which testator followed,—a clause leaving the residue of his estate "in trust" to his executors, with direction that they be not required to furnish bond and might use their best judgment, is *held* not to have created any trust; the phrase "in trust" having been used in its popular sense, expressive of the confidence which testator reposed in his executors.

APPEAL from a judgment of the county court of Milwaukee county: JOHN C. KAREL, Judge. *Affirmed.*

The appeal is from a judgment construing the residuary clause of the will of Thomas P. Dever, deceased. Thomas P. Dever died January 12, 1920, aged about sixty years, without issue, widow, parents, brothers, or sisters surviving. The petitioner is his aunt, a woman about sixty-six years of age, his only surviving relative in the third degree of kindred, and therefore sole heir at law next to kin. On February 26, 1919, the testator, while on a visit in the city of New Orleans, accompanied by Dr. Bradley of Milwaukee, went to the office of a friend named Bertaut, and there, from his own written memoranda, dictated and afterwards executed the will in question. After the usual clauses the will made devises and bequests as follows: to petitioner, *Katherine Orr,* certain real estate of the value of about $4,000 and $3,000 in government bonds, amounting in the whole to about $7,000; to two cousins, the sum of $2,000 and $3,000 each, respectively; to various charities, six in number, the sum of $3,200; to his housekeeper, Annie Dorn, certain real estate, household goods, and $3,000; and to *Henry Thompson,* one of the executors, personally, $10,000; for the perpetual care of family cemetery lot, $500. Then follows the residuary clause in this language:

"The residue of my estate I leave in trust (including any stock of Dever Bros. Paper Company, Dever Realty Company, owned by me) to *J. F. Dahlman, Henry M. Thompson,* and *Edward W. Spencer,* and I do hereby direct that they be not required to give or furnish any bond, as my executors, and use their best judgment."

The judgment of the county court construed said residuary clause as a valid devise and bequest of the residue of the estate of said deceased to *J. F. Dahlman, Henry M. Thompson,* and *Edward W. Spencer,* personally, and that it was not the intention of the testator to create a trust by such residuary clause. From the judgment so entered the petitioner appealed.

Paul D. Carpenter of Milwaukee, for the appellant.

For the respondents there was a brief by *Lawrence A. Olwell,* attorney, and *Louis A. Dahlman* and *Bernard V. Brady,* of counsel, all of Milwaukee; and the cause was argued orally by *Mr. Olwell.*

OWEN, J. It is the contention of the appellant that by the language of the residuary clause of the will the testator attempted to create a trust, which is void for uncertainty and indefiniteness, and that the residue of the estate should be disposed of as intestate property. It is conceded that if the testator did intend to create a trust it is too indefinite and uncertain to be administered, and the attempt failed. The question here is, Did the testator attempt to create a trust? Appellant's contention in this behalf is based entirely upon the use of the phrase "in trust" in the clause of the will under consideration, which it is claimed conclusively reveals the purpose of the testator to create a trust. Counsel hazards the statement that he knows of no case in which any court, despite much general language as to intention, has ever wiped out of any will the plain words "in trust."

In construing a will the constant effort of courts is to ascertain and give effect to the intention of the testator. The phrase "in trust" or "upon trust" has a well settled technical meaning, and when used advisedly in a will in connection with a devise or bequest affords rather plain evidence of the intention of the testator. This, we say, is the result where the words have been used advisedly. As was said of this, or a similar, phrase in *Davies v. Davies,* 109 Wis. 129 (85 N. W. 201) at p. 133:

"Had these words been used by a trained lawyer, the argument that they must receive their true technical meaning would be strong; but here the fact that they were used by a layman, albeit an educated man, is of great importance. The word 'trust,' in its popular sense, covers many things besides the legal and technical trust."

In *Danforth v. Oshkosh,* 119 Wis. 262 (97 N. W. 258) at p. 276 it is said:

"Of course, the presence or absence of words declaring an estate to be in trust is not conclusive, though they may be more or less significant of the purpose in the grantor's mind. [Citing.] The question is whether the testator's intent involved the elements of a trust as known to the law."

These expressions sufficiently indicate that this court has not considered the use of these words as conclusive of the intention of the testator, and has not felt precluded from making further inquiry concerning such intention merely because the phrase "in trust" or "upon trust" is used in connection with a devise or bequest contained in a will. We are also impressed with the thought that where a testator says he gives "in trust" or "upon trust," but makes no attempt to prescribe the terms or purposes of the trust, a court may well pause and consider whether it was really the intention of the testator to create a trust in the legal sense. When the phrase "in trust" or "upon trust" is used advisedly, he who uses it understands that the terms and conditions of the trust must be defined with definiteness and certainty. When a testator says he gives "in trust" and says no more, the query most naturally arises as to whether the phrase was inserted for the purpose of creating a trust in the true legal sense. We think such a situation gives rise to an ambiguity, and the court may summon to its aid all legitimate considerations that will enable it to determine the intent of the testator with reference to the disposition of the residue of his estate. It will be proper, therefore, for us to consider the extent of his estate, his family relations, his attitude towards his next of kin, and his relations with those who claim to be his beneficiaries under the residuary clause.

Before proceeding to such considerations, however, we may properly refer to the important fact that the testator was an uneducated man, that he personally dictated the will, and there is much less reason for supposing that the phrase was used in its legal and technical sense than if the will had been prepared by a lawyer, or even an educated man. Then, too, the context in which it appears in and of itself indicates great trust and confidence in the three men named. He constitutes them the executors of his will and directs that they be not required to give or furnish any bond, and, whether the testator did or did not intend to create a trust, it appears that he confided to them the disposition of the greater portion of his estate. This circumstance in and of itself furnishes strong justification for the conclusion of the learned county judge that "he used these words in a general or popular sense, denoting trust, confidence, faith or reliance, the confidence, faith, belief or reliance resulting from intimate friendship and association for many years, that they as executors would make such disposition of the residue of his estate as they might determine upon."

We think this conclusion is also strongly reinforced when we consider the other circumstances which we have indicated may be considered as bearing upon this question. The testator was a man sixty years of age and had no kinship of the first degree: no wife and no children, no father or mother, sister or brother. His closest blood relative was the petitioner, *Katherine Orr,* an aunt, who was around seventy years of age, and who had long been a resident of California. It does not appear that any particular intimacy existed between the testator and this aunt. He also had two cousins whom he remembered in his will. The total value of his estate approximated $140,000. His specific bequests did not exceed $40,000. The residue of his estate amounted to about $100,000. Of his relatives, the petitioner, his aunt, received most generous consideration. But her legacy did not exceed the legacy to his housekeeper nor the specific

legacy to *Mr. Thompson*. This indicates that he did not recognize superior claims on the part of his relatives to his gratitude and his bounty. And this, we think, was not unnatural. His aunt was an aged woman, older than he, living in a distant state. The evidence shows no particular intimacy between them. The record likewise fails to show affection or intimacy between the testator and his cousins, who were remembered in the will. On the other hand, it is shown that the testator had been a lifelong resident of the city of Milwaukee. The three men mentioned in the residuary clause were his daily companions and associates. He met and mingled with them daily not only at their clubs, but he was a frequent caller at their homes and the recipient of cordial hospitality by their families. He sought their personal companionship and courted the glow and warmth of their firesides. No doubt they had contributed more than his distant relatives, or any others, to the comfort and happiness of his celibate life. Under these circumstances it is neither unnatural nor surprising that he made them the objects of his solicitude and his bounty. As already remarked, his predisposition so to do is clearly revealed by his specific bequest of $10,000 to *Mr. Thompson*. We do not consider this circumstance as an indication that *Mr. Thompson* was remembered to the exclusion of the others; but rather, for reasons known to himself, he desired to show *Mr. Thompson* this special mark of gratitude.

Counsel for respondents urge another consideration which is not without force to indicate an absence of purpose on the part of the testator to create a legal trust. In drawing the will the testator had before him the will of his deceased brother. In that will the testator had been appointed the trustee of an express trust, which he had administered under the guidance of his attorney, *Mr. Spencer*, who is one of the residuary legatees here. He had copied the opening paragraphs of the will verbatim and in making specific legacies had closely followed the language of his brother's will.

notably the legacy to the petitioner here and his two cousins. The trust provisions of his brother's will were ample and lawyer-like. He however made no attempt to follow the trust features of his brother's will. That, if it had been his purpose to create a trust, he would have availed himself of the form embodied in that will, which he followed so closely in other respects, seems highly probable. We think this is a legitimate argument and entitled to more than passing weight in arriving at a determination as to what the testator's intention was.

We feel satisfied, from all the circumstances, that the county court arrived at a correct conclusion. We think the phrase "in trust" was used by the testator not in its technical and legal but in its popular sense, and that in the connection in which it was thus used it was intended to be expressive of the trust and confidence which the testator reposed in his lifelong friends and associates, and that it was his intention that they should take the residue of the estate, to use or dispose of as they might see fit. A gift of this kind carries with it absolute ownership. *Tinsley's Will* (Iowa) 174 N. W. 4; *Ralston v. Telfair*, 17 N. C. 255; *Hill v. Fiske*, 69 Misc. 507, 125 N. Y. Supp. 1026; *Higginson v. Kerr*, 30 Ont. 62; *Cheney v. Plumb*, 79 Wis. 602, 48 N. W. 668; *Bristol v. Bristol*, 53 Conn. 242, 5 Atl. 687; *Barnett v. Barnett*, 117 Md. 265, 267, 83 Atl. 160.

By the Court.—Judgment affirmed.

APPLICATION OF GRUHL SASH & DOOR COMPANY.

December 15, 1920—January 11, 1921.

Appeal and error: Affirmance by divided court.

Where the justices of the supreme court are equally divided in opinion on the question involved on an appeal, the order appealed from will be affirmed.

APPEAL from an order of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

Proceeding instituted by a landowner under sec. 1852, Stats. 1917, for the condemnation of certain of its land by a railway company which, petitioner claims, appropriated the land for railroad right-of-way purposes. The strip of land in question averages about three feet in width. The trial court determined that the land had been so appropriated and ordered the appointment of appraisers for condemnation. From this order the railway company appeals.

For the appellant there was a brief by *C. H. Van Alstine* and *H. J. Killilea,* both of Milwaukee, and oral argument by *Mr. Van Alstine.*

For the respondent there was a brief by *Otjen & Otjen* of Milwaukee, and oral argument by *Henry H. Otjen.*

JONES, J. Mr. Justice KERWIN did not participate in the consideration and decision of this case. The court is equally divided in opinion upon the question involved on this appeal. Mr. Justice VINJE, Mr. Justice ROSENBERRY, and Mr. Justice ESCHWEILER are of opinion that the order appealed from should be reversed, and Mr. Chief Justice SIEBECKER, Mr. Justice OWEN, and the writer are of opinion that the order should be affirmed. Under the established rule it follows that the order appealed from is affirmed. *Swenson v. Flint,* 123 Wis. 613, 101 N. W. 1135; *Hagenah v. Milwaukee E. R. & L. Co.* 136 Wis. 300, 116 N. W. 843; *Estate of Carter,* 167 Wis. 89, 166 N. W. 657.

By the Court.—The order appealed from is affirmed.

STOWELL COMPANY, Respondent, vs. SOUTH SIDE MALLEABLE CASTING COMPANY, Appellant.

December 15, 1920—January 11, 1921.

Sales: Evidence: Use of goods: Burden of proving unmerchantableness of goods: Appeal: Failure of defendant to request opening and closing argument.

1. Where the only issue in an action for the purchase price of annealing pots was whether they were merchantable, it was proper for the jury to consider the conduct of defendant in using them, there being evidence tending to show that pots delivered previously were of the same kind and quality and were used by the defendant.
2. Where the only issue submitted by a special verdict involved the inquiry as to whether the pots delivered were in fact merchantable, the court did not err in refusing defendant's request to instruct that, "where goods purchased are necessarily used to maintain a manufacturing plant in operation, the use of the goods is not a waiver of the right to claim damages if the goods were not merchantable or of the quality contracted for," nothing going to the jury which would lead them to believe that failure to tender back the pots was a waiver of the defendant's right to recover damages, and the instruction given informed the jury that no question of waiver or tender was to be considered.
3. Where a sale of the pots constituted a sale of a recognized commodity in the market and not a contract for pots to be manufactured pursuant to particular specifications different from those which constituted the marketable commodity, the burden of showing that the articles delivered were not merchantable rested on the buyer, in order to entitle him to a reduction of the claim for the purchase price.
4. It was not prejudicial error for the court not to tender to defendant, upon whom the burden of proof rested, the opening and closing argument to the jury, where the question was not brought to the trial court's attention and there was nothing in the record showing affirmatively that a different determination of the issues submitted to the jury would probably have been arrived at had the defendant opened and closed the argument.

APPEAL from a judgment of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Affirmed.*

This action was brought to recover the sum of $5,763,

with interest, which sum represents the cost of certain annealing pots alleged to have been sold and delivered by the plaintiff to defendant on or about December 21 and December 31, 1918.

Plaintiff claims that on December 21, 1918, it sold and delivered to defendant a carload of annealing pots at the agreed price of $2,766, which were received and accepted by defendant, and that on December 31, 1918, another carload of such pots at the agreed price of $2,997 were also sold and delivered to defendant and accepted by it; that under the terms of the sale the amounts became due and payable for said merchandise respectively on January 20, 1919, and on January 30, 1919; that no part thereof has been paid.

Defendant alleges that annealing pots of good and suitable material, manufactured with good workmanship, which would stand an average of upwards of thirty heats in annealing furnaces, were to be furnished; that the annealing pots in question, when subjected to an average of three heats, cracked, disintegrated, and became wholly worthless; that the pots were worth only one tenth of the agreed price, or $576.30.

The case was tried before the court and a jury. By a special verdict the jury found that the two carloads of annealing pots delivered to defendant were reasonably fit for the purpose required by defendant, and judgment for plaintiff was ordered for $6,328.97. This is an appeal from such judgment.

For the appellant there was a brief by *Edgar L. Wood*, and oral argument by *Mr. Charles F. Millman* and *Mr. Wood*, both of Milwaukee.

For the respondent there was a brief by *Quarles, Spence & Quarles*, attorneys, and *Arthur B. Doe*, of counsel, all of Milwaukee; and the cause was argued orally by *Mr. Doe*.

SIEBECKER, C. J. The defendant claims that the trial court committed prejudicial error in refusing to instruct the

jury as requested that "Where goods purchased are necessarily used to maintain a manufacturing plant in operation, the use of the goods is not a waiver of the right to claim damages if the goods were not merchantable or of the quality contracted for." The question submitted to the jury involves the inquiry whether the annealing pots were in fact merchantable articles. True, the language used in framing the question asked was whether the pots were reasonably fit for the particular purpose for which they were sold. Looking into the transactions of the parties as disclosed by the uncontradicted evidence, it appears that the order for pots in May preceding the last deliveries in December was one for the sale of a quantity of pots to be delivered in carload lots beginning in May and ending in December. It was not an order for some particular articles to be manufactured pursuant to specifications different from those offered as a commodity for sale in the market generally. We think the trial court properly held that the issue submitted by the special verdict and decided by the jury involved the inquiry whether the pots delivered by plaintiff were in fact merchantable. In determining this question it was proper for the jury to consider the conduct of defendant respecting the pots delivered in May and thereafter and used in its business up to the time complaint was made concerning the last two carloads involved in this case, because there was evidence tending to show that all of the pots delivered in May and thereafter, including the last deliveries in December, were of the same kind and quality. No question was litigated nor submitted to the jury concerning defendant's duty to tender back these pots so used by defendant. Nor does the record disclose that the court permitted anything to go to the jury which could lead them to believe that failure to tender back the pots was a waiver of defendant's right to recover any damages it suffered if the pots were not merchantable or of the quality contracted for. Under these circumstances it was not necessary to instruct the jury on the

points requested in the two rejected instructions, and such refusal to instruct could in no way operate to defendant's prejudice. The only defense raised by the pleading on this phase of the case was, Were the pots merchantable? The issue was a simple one and clearly submitted to the jury. The requested instructions were properly rejected by the court as not applicable to the issues submitted by the special verdict. The court's instructions sufficiently informed them that no question of waiver or tender was raised or to be considered by them. The evidence that defendant kept and used the pots was only material on the inquiry whether or not they were merchantable. If the pots were not of that quality, then defendant was entitled to recover for the loss it sustained by reason of their defective quality.

As above indicated, it is clear that the transaction of the purchase and sale of these pots constituted a sale of a recognized commodity in the market. It was not a contract for annealing pots to be manufactured pursuant to particular specifications different from those which constituted the marketable commodity. We are persuaded that the sale in question was correctly treated by the trial court as a sale of a marketable commodity of a merchantable quality. Under such a sale the burden of showing that the articles were not merchantable rests on the purchaser in an action for the recovery of the purchase price in order to entitle him to reduce the claim for the purchase price. *Oscar Smith & Sons Co. v. Janesville B. Mills,* 150 Wis. 528, 137 N. W. 966.

It is contended that it was prejudicial error for the court not to tender to defendant the opening and closing argument to the jury, since the burden of reducing the plaintiff's claim for the purchase price rested on it. Nothing is pointed out in the proceeding before the trial court to show that this question was brought to the court's attention. We fail to find anything in the record showing affirmatively that a different determination of the issues submitted to the jury would probably have been arrived at had the defendant

opened and closed the argument to the jury. We find no reversible error in the record.

By the Court.—The judgment appealed from is affirmed.

KAUSCH, Respondent, vs. CHICAGO & MILWAUKEE ELECTRIC RAILWAY COMPANY, Appellant.

December 15, 1920—January 11, 1921.

Carriers: Interurban railways: Injuries to person about to board car: Special verdict: Framing questions: Burden of proof: Evidence: Res gestæ: Argument of counsel: Correction of judgment: Clerical mistake.

1. By mistake a judgment in an action in the civil court of Milwaukee county was entered against the N. company instead of the M. company. The N. company appealed to the circuit court. The M. company was brought in on an order to show cause, and the action was dismissed as to the N. company and affirmed as to the M. company. *Held* that, there being no prejudice to the M. company, the circuit court properly corrected the judgment instead of remanding the case for that purpose.
2. Where the complaint alleged that defendant's street car was standing still when plaintiff attempted to board it and that it was negligently started up suddenly, throwing him against a parked automobile and injuring him, it was error to give an instruction placing on defendant the affirmative of the issue presented by the question to the jury, Was the car in motion when plaintiff attempted to board it?
3. Questions submitted to the jury should be so framed as to put the burden of proof on the affirmative; and the placing upon the wrong party of the burden of proof as to a material issue is prejudicial error, where the jury's finding is against such party.
4. A statement in the argument of counsel that witnesses have been persuaded to come in and perjure themselves, there being nothing to warrant such implication, is improper.
5. The testimony of a passenger on the car that after it started up again he upbraided the conductor for not picking up the man is inadmissible, not being part of the *res gestæ*, and, even if so considered, not being an expression characterizing the injury.

APPEAL from a judgment of the circuit court for Milwaukee County: OSCAR M. FRITZ, Circuit Judge. *Reversed.*

Action begun in the civil court of Milwaukee county against the Chicago, North Shore & Milwaukee Railroad and this defendant to recover damages for an injury sustained by plaintiff while attempting to board one of defendant's street cars. The complaint alleged "That while your plaintiff was in the act of boarding said street car which had come to a stop and while your plaintiff had one foot upon the platform of said street car and one hand upon the handbar of said street car, the motorman in charge of the operation of said street car negligently and carelessly caused said street car to suddenly and with a fast movement to proceed in a northerly direction on Grove street, causing your plaintiff to be thrown violently and forcibly against an automobile which was parked near the southeast corner of the intersection of Grove street and Lincoln avenue and in close proximity to the north-bound street car track," causing damage to the plaintiff in the sum of $2,000. The answer, among other defenses, alleged contributory negligence on the part of plaintiff and contained a general denial.

The jury, so far as this defendant is concerned, returned a special verdict as follows:

"(1) Was the car of the defendant, *Chicago & Milwaukee Electric Railway Company,* in motion at the time the plaintiff attempted to board the same? *A.* No.

"(2) Was the defendant's, *Chicago & Milwaukee Electric Railway Company's,* conductor guilty of negligence in giving the signal to start the car while plaintiff was in the act of boarding the car? *A.* Yes."

"(7) Was the plaintiff guilty of any want of ordinary care which proximately contributed to produce his injury? *A.* No.

"(8) If the court should be of the opinion that the plaintiff is entitled to recover, at what sum do you assess his damages? *A.* $2,000."

Upon this special verdict, by mistake a judgment was en-

tered against the Chicago, North Shore & Milwaukee Railroad. It appealed to the circuit court, and the defendant was brought in on an order to show cause why it should not prosecute the appeal in the circuit court. The trial resulted in a dismissal of the action as to the Chicago, North Shore & Milwaukee Railroad and in an affirmance of the judgment as to the defendant, it having been substituted in place of the Chicago, North Shore & Milwaukee Railroad to cure the clerical mistake that occurred in entering up judgment against the wrong defendant. From the judgment so entered the defendant appealed.

For the appellant there was a brief by *Edgar L. Wood* of Milwaukee, attorney, and *A. L. Gardner* of Chicago, of counsel, and oral argument by *Mr. Wood.*

For the respondent there was a brief by *Ray J. Cannon* and *A. W. Richter,* both of Milwaukee, and oral argument by *Mr. Richter.*

VINJE, J. Error is claimed because the circuit court did not dismiss the appeal of the Chicago, North Shore & Milwaukee Railroad and send the case back to the civil court for correction of the judgment. Since it is apparent that it was a pure clerical mistake to render judgment against the Chicago, North Shore & Milwaukee Railroad instead of against the defendant herein, and since it was brought in and had its day in court without in any respect, so far as we can see, being prejudiced by the manner of its appearance, we conclude that the circuit court properly corrected the judgment instead of remanding the case for that purpose.

The plaintiff alleged, and the burden is upon him to prove, that the car stood still when he attempted to board it. The negligence complained of was the sudden starting of the car while he was in the act of boarding it. No recovery can be had unless such negligence is established by a preponderance of the evidence and to a reasonable certainty, for it is the very gravamen of the action. And the burden of proof is

upon the plaintiff to establish it. Nevertheless the civil court instructed the jury that the burden of proof was upon the defendant to prove the affirmative of the issue presented by question No. 1. This was error. The court should have instructed the jury that the burden of proof was upon the plaintiff to establish the fact that the car was not in motion when he attempted to board it. Or, better still, the question should have been so framed as to call for plaintiff's proving the affirmative by wording the question as follows: Was defendant's car standing still when plaintiff attempted to board it? Questions should always be so framed as to put the burden of proof upon the affirmative. This court has consistently held that the placing upon the wrong party of the burden of proof as to a material issue is prejudicial error where the jury finds against the party upon whom the burden has been wrongly placed. *Parker v. Hull*, 71 Wis. 368, 37 N. W. 351; *Carle v. Nelson*, 145 Wis. 593, 130 N. W. 467; *Pennsylvania C. & S. Co. v. Schmidt*, 155 Wis. 242, 144 N. W. 283.

It will be observed from an examination of the special verdict that nowhere was the plaintiff required to prove the issue tendered by it. The second question could be answered in the affirmative as a matter of law where, as here, the conductor said he saw plaintiff attempting to board the car—assuming it was standing still, as the question does. The defendant and the conductor claim the car was moving when plaintiff attempted to board it.

Since there must be a reversal because the burden of proof was wrongly placed upon defendant as to a material issue found against it, it is perhaps not necessary to refer to other errors claimed except to those that may occur again. Of such there are two.

There was conflict in the testimony as to whether defendant's servants assisted plaintiff to get on the car after he was hurt. He did get on the car. A witness for plaintiff, one Wawrzyniakowski, was permitted four or five times to

repeat a conversation he had with the conductor of the car after the accident. Plaintiff's counsel, during the examination, call it an argument. Each time this in substance was elicited from the witness: "I told him this way. You ought to pick the man up. You haven't pity on a man. They have pity for a dog and take him to the gutter. You don't have pity for this man. Those are the words I said." Repeated objections to this testimony were seasonably made as well as motions to strike it out, but without avail, and in the argument to the jury a number of changes were rung on the fact that defendant had no pity for a man but did have for a dog. One sample will suffice. "I will characterize it that they did permit him to lay out in the street just like a yellow dog. You did not care for him any more than for a yellow dog at the time." The fact was that the street car stopped as soon as the accident was discovered and plaintiff proceeded as a passenger on it.

Two young men, one fifteen years of age and the other twenty, testified in substance that they were passengers on the street car; that they saw plaintiff come out from near the end of the automobile and attempt to get on the car while it was moving; that the reason they watched was because he attempted to board a moving car; that there were few passengers on the car and the conductor asked their names and wrote them down, and that they had talked with counsel for defendant about the facts they could testify to. In commenting on this testimony to the jury counsel for plaintiff said: "The young men who testified on behalf of the railway company had been persuaded and caused to come in and perjure their young souls in this case;" and again, "I claim that there is somebody else back of the scenes that induced these two young men to come into court and to testify to something that you, gentlemen, yourselves know and Mr. Helmuth knows was not true—do men who resort to such tactics deserve your confidence and consideration?"

Judicial utterances condemning such arguments have been too frequent and emphatic to need repetition here. *Brown v.*

Swineford, 44 Wis. 282; *Andrews v. C., M. & St. P. R. Co.* 96 Wis. 348, 71 N. W. 372; *Sutton v. C., St. P., M. & O. R. Co.* 98 Wis. 157, 73 N. W. 993. There is nothing in the case to warrant the implication that the young men had been persuaded or caused to come and testify falsely. Their evidence, in the opinion of counsel for plaintiff, may not have had much probative force, and that was a proper subject of legal argument, but not that there had been subornation of perjury.

So, too, the testimony of the conversation of the witness Wawrzyniakowski had with the conductor after the car started again was inadmissible for two reasons. It was not a part of the *res gestæ,* and, even if so considered, it was not an expression characterizing the injury. It was nothing but the scolding the witness gave the conductor because he claimed the latter had been remiss in his duty to aid plaintiff after he was injured. The evidence was incompetent for any lawful purpose. It could only excite prejudice; it could tend to prove no material fact in issue. We specially mention these two violations of proper practice, to the end that they may not occur again and perhaps cause a reversal should the jury find for the plaintiff.

By the Court.—Judgment reversed, and cause remanded for a new trial.

STATE EX REL. CITY OF WEST ALLIS, Appellant, vs. MILWAUKEE LIGHT, HEAT & TRACTION COMPANY, Respondent.

December 16, 1920—January 11, 1921.

Eminent domain: Removal of interurban railway tracks from private way to street: Liability to abutting owners: Power of municipality to compel removal.

1. An interurban railway company which owned the portion of the street on which its tracks were situated, subject to the right of the public to use it for highway purposes, cannot remove its tracks from its private right of way to another portion

of the street on demand of the city without assuming liabilities to abutting property owners; and before any condemnation the interurban railway must first obtain the consent of the city thereto.

2. A city has no authority under the provisions of the general charter law (sub. (31), sec. 925—52, Stats. 1919), empowering it to establish and alter grades of streets, or by sub. (51) of that section, empowering it to regulate the laying down of street-car tracks, to require an interurban railway, which laid its tracks on a private right of way before the city was organized, to move its tracks from the right of way which it still owned to another portion of the street, so as to bring the tracks into the center of the street.

APPEAL from an order of the circuit court for Milwaukee county: E. T. FAIRCHILD, Circuit Judge. *Affirmed.*

The petitioner is a city of the fourth class within the county of Milwaukee. Within its present corporate limits Burnham street runs east and west between Forty-ninth and Fifty-third avenues with Fifty-first avenue between these, all three crossing Burnham street. The defendant and respondent is an interurban street railway running its cars upon the portion of Burnham street above mentioned.

The territory in question had formerly been within the limits of the town of Greenfield, was subsequently incorporated within the village of West Allis, which in 1906 became incorporated as the city of *West Allis.*

The defendant is operating under an indeterminate permit as provided for in sec. 1797*t*—3, Stats.

In May, 1916, the common council of the petitioner enacted an ordinance regulating the use of the streets by street railway companies, declaring it to be the duty of every corporation then or thereafter engaged in operating a street railway within the city of *West Allis* to maintain its tracks of a certain gauge and to keep them not elevated above nor depressed below the established grade of the street or highway, and its tracks to be laid in such manner that carriages and other vehicles can easily and freely cross said streets at any and all points without obstruction, and "to be laid as

near the center of said streets and highways and as near together as practicable."

For some time prior to May, 1916, the tracks of the defendant company were not exactly in the center of said portion of Burnham street as then existing. During the year 1917 the petitioner widened Burnham street on the south side thereof from Fifty-first avenue west to and including Fifty-third avenue, having had the strip so added conveyed to it by the adjoining property owners.

Thereafter the common council of petitioner passed a resolution directing the defendant to move its tracks between Forty-ninth and Fifty-third avenues to the then and new center of Burnham street and directing that such moving should be completed by October 1, 1918, and due service of a copy of such resolution was made upon the defendant company. The defendant refused to comply with said resolution and so notified the common council, and an alternative writ of *mandamus* was thereupon issued to compel compliance with such resolution.

The petition therefor recited that Burnham street and the avenues in question were much traveled public highways and that "by reason of the location of said tracks upon said highway beyond the center of said street and by reason of the street cars traveling to and fro upon the said tracks, and particularly interurban cars which travel at high rates of speed, the said highway, Burnham street, by reason of the fact of the said track of the defendant company not being in the center of said street, is in a dangerous and unsafe condition."

It further appears that at the east line of Forty-ninth avenue the tracks were and are .25 feet north of the center line of Burnham street as widened and improved; at the west line of Fiftieth avenue 9.56 feet north, and at the west line of Fifty-first avenue 12.56 feet north of the center, and continue to be such distance north up to Fifty-third avenue.

In its return the defendant alleged, among other things, as follows:

"By way of justification for its refusal to comply with the terms of said writ and with the provisions of the certain ordinances set forth therein directing the defendant to change the location of its tracks and to lay and construct the same along and upon the center line of Burnham street, the defendant alleges that the said city of *West Allis* is without power, except at its own expense, to compel the defendant to change the location of its said tracks and reconstruct the same over the route sought by said city of *West Allis*. In support of such claim of justification the defendant alleges the following facts:

"(a) The defendant's tracks between Forty-ninth avenue and Fifty-third avenue in the present city of *West Allis* were constructed many years ago upon private right of way; that said tracks were constructed upon the location conveyed to the defendant by the owners in fee simple of said premises; that such owners retained the right to thereafter lay out a highway along and upon the defendant's tracks, but such reservation was subject to the condition that any such dedication should be subject to the rights of the defendant, and that the owners of said premises retained no interest therein except an interest which was expressly subject and subordinate to the right of the defendant to maintain and operate a line of electric railway along and upon the premises so conveyed.

"(b) That the defendant's tracks were constructed and have ever since been maintained and are now located and maintained upon the route so conveyed to it.

"(c) That the rights of the defendant so acquired have never been condemned by, or conveyed to, petitioner.

"(d) That subsequent to the grant to the defendant of said right of way, the defendant's grantors, by dedication or otherwise, conveyed to the city of *West Allis*, or its predecessor, the use, for highway purposes, of the grantor's servient estate in the premises over which the defendant had been theretofore so granted a right of way, but such conveyance or dedication conveyed to the city of *West Allis*, or its predecessor, only the rights of said owners which were subject and subordinate to the right of the defendant.

"(e) That at the time such highway was opened over and

along said premises that portion of said premises so conveyed to defendant was occupied by the defendant's tracks and was already devoted to a public use; that the easement for public travel imposed by the laying out and opening of a highway, pursuant to the grant by such owners of rights subordinate to those of this defendant, is not superior to the rights of the defendant theretofore conveyed to it by the owners of the fee of the said premises.

"(f) That by the laying out and opening of said highway along a course varying from the location of defendant's tracks as theretofore constructed upon the right of way conveyed to it, the city of *West Allis*, or its predecessor, has accepted said premises for highway purposes *cum onere* and subject to the defendant's right to maintain and operate its line of railway upon the location theretofore conveyed to it.

"(g) That the defendant does not possess and has never possessed either the property rights and easements or the franchise rights necessary for the construction and operation of its railway upon the location to which the petitioner seeks to compel it to remove its tracks; that it is unwilling to apply for, or accept, a franchise covering such location or to acquire by purchase or condemnation the property rights and easements necessary therefor, except upon reasonable conditions which it has proposed to the petitioner and which the petitioner has rejected."

To this portion of the return the petitioner demurred on the ground that such alleged justification did not set forth facts sufficient to constitute a proper and sufficient return to the writ, or justification for its refusal to comply.

Upon the hearing the circuit court overruled such demurrer, and from the order so holding the petitioners have appealed.

Joseph E. Tierney of West Allis, for the appellant.

For the respondent there was a brief by *Van Dyke, Shaw, Muskat & Van Dyke* of Milwaukee, and oral argument by *James D. Shaw.*

ESCHWEILER, J. By the relator's demurrer to that portion of the return above quoted it must be considered as

admitted that the defendant has neither property rights, easements, nor franchise rights necessary for the construction and operation of its railway upon that portion of Burnham street to which petitioner desires that it should remove its tracks. It must also be considered as admitted that the tracks as now laid are upon a private right of way which had been granted to it prior to plaintiff's incorporation by the then owners of the freehold, subject only to the reserved right in said grantors to lay a highway upon and along said strip of land so conveyed.

It is manifest that such an interurban railway company whose tracks are laid upon a private right of way is in a substantially different position from and possesses property rights which do not belong to a similar company operating upon a public highway. To require it to move from its present location on its own property to other property to which it has no property right, easement, or franchise would in effect amount to taking away the property right that it now has to the soil upon which its tracks are laid and requiring it to assume substantially different liabilities and obligations both as to the abutting owners on the new Burnham street and to the municipality.

Before it can lawfully run upon the new trackage as proposed by the petitioner it must, under the admitted facts, assume liabilities to the abutting property owners for which such owners are entitled to compensation. Before any right of condemnation can be exercised as against such abutting property owners by such interurban railway it must first obtain the consent of the municipality. *Manitowoc v. Manitowoc & N. T. Co.* 145 Wis. 13 (129 N. W. 925), and cases cited at p. 22.

We find no warrant under the provisions of the general charter law upon which petitioner relies, either by sub. (31), sec. 925—52, Stats., giving to cities authority to establish and alter grades of streets and sidewalks, or by sub. (51), sec. 925—52, Stats., as to regulating the running of street

railway cars, the laying of tracks for the same, and the transportation of passengers, etc., for the power proposed to be exercised in this particular instance.

The question involved in many of the cases cited in the respective briefs as to the power of the municipality to require the moving of a track once laid upon a public highway to another portion of the same, is not, under the facts as admitted by the demurrer in this case, before us, and we therefore express no opinion thereupon and a review of such cases is not necessary. A reference to many of them is found in the case of *Grand Trunk W. R. Co. v. South Bend,* 227 U. S. 544, 553, 33 Sup. Ct. 303. The distinction between the powers of the state and of a municipality in such matters is pointed out in *People ex rel. New York v. N. Y. R. Co.* 217 N. Y. 310, 112 N. E. 49.

Other questions were presented in the briefs in this matter, but we are disposing of this appeal upon the one point above determined and express no opinion upon the others. For the reasons above stated the demurrer to the return was properly overruled.

By the Court.—Order affirmed.

FOSTER, Respondent, vs. BAUER, Appellant.

December 16, 1920—January 11, 1921.

Automobiles: Negligence: Law of the road: Violation: Cutting corner: Excessive speed: Contributory negligence: Civil court of Milwaukee county: Appeal: Weight to be accorded findings.

1. An automobile driver who, in making a turn, cut a corner, in violation of sub. 1, sec. 1636—49*b*, Stats., was guilty of negligence *per se*.
2. The evidence in this case is *held* to show that the driver's negligence in cutting a corner so contributed to the collision between his car and plaintiff's motorcycle that he can recover nothing on his counterclaim against plaintiff.
3. The plaintiff, a deputy sheriff, was negligent where at the time of the accident he was running his motorcycle at a speed of

twenty or twenty-two miles an hour, sec. 1636—49, Stats., prescribing a maximum speed of fifteen miles an hour.

4. Findings of the civil court of Milwaukee county have the same status on appeal to the circuit court as findings of the circuit court on appeal to the supreme court. They are not entitled to the conclusiveness of the verdict of a jury, but are controlling unless against the clear preponderance of the evidence.
5. A finding of the trial court that plaintiff struck defendant's automobile as it rounded a corner, that he would have struck the automobile had he been going at a lawful speed, and that his rate of speed was not the proximate cause of the collision, is against the clear preponderance of the evidence, where plaintiff testified that he could have stopped his motorcycle within twenty feet had he been going fifteen miles per hour and that he was twenty to twenty-five feet from defendant when the latter started to turn.

APPEAL from a judgment of the circuit court for Milwaukee county: E. T. FAIRCHILD, Circuit Judge. *Reversed.*

Action for damages for personal injuries. Defendant counterclaimed for damages to person and property. Trial in the civil court of Milwaukee county without a jury resulted in a judgment for the plaintiff. On appeal to the circuit court the judgment was affirmed. From the judgment of affirmance the defendant brings this appeal.

This action arose out of a collision between respondent on his motorcycle and appellant in his automobile at the intersection of Fond du Lac avenue and Hadley street in the city of Milwaukee, during daylight, on June 13, 1919. Fond du Lac avenue lies in a northwesterly and southeasterly direction, while Hadley street extends east and west. Appellant was proceeding southeasterly on the southwest side of Fond du Lac avenue, approaching the intersection, at a speed of six to eight miles per hour. Respondent, a motorcycle deputy sheriff, was proceeding on duty northwesterly on the northeast side of Fond du Lac avenue, approaching the intersection from the side opposite defendant, at a speed which he himself testified was between twenty and twenty-two miles per hour, and there was no testimony that his speed was less than that.

Appellant desired to turn easterly on Hadley street and as a signal held out his left hand,—so at least he testified, and it was corroborated by other witnesses, though respondent did not observe it. Instead of passing to the right of the center of the intersection of the streets, however, as he should have done, according to some of the testimony and the finding of the trial court he "cut the corner." Appellant did not notice respondent until the latter was about twenty feet from the point of the collision; he said that respondent's clothes looked so much like the pavement that he didn't see him. Respondent had observed appellant when they were about a block apart and kept a lookout ahead from then till the time of the collision according to his testimony. Neither party made any signal by sound.

When about twenty to fifty-five feet apart, according to different statements in respondent's testimony, he saw that appellant was turning into Hadley street, saw that he could not miss appellant, so turned to the right to hit the curb. Appellant must have put on power, respondent thought, and the motorcycle hit the front right wheel of the automobile. Respondent did not apply his brakes at all in an effort to avoid the collision or to reduce the force of the impact.

There was no showing that respondent was justified by anything in the line of his duty in exceeding the lawful speed limit of fifteen miles per hour or such reduced rate as would tend to avoid danger of accident in view of the street intersection.

The trial court found that appellant's negligence in turning was the proximate cause and respondent's speed not a proximate cause of the injuries, and gave judgment for respondent accordingly. The circuit court considered this a question of fact, found evidence to sustain it, and on that ground affirmed the judgment as a matter of course.

J. Elmer Lehr of Milwaukee, for the appellant.

For the respondent the cause was submitted on the brief of *Ray J. Cannon* of Milwaukee.

JONES, J. Appellant contends that no negligence on his part has been shown. With this we cannot agree. The trial court found that appellant "cut the corner" in violation of law and was guilty of negligence in so doing. The finding is sufficiently supported by the evidence. The statute (sub. 1, sec. 1636—49*b*) forbidding such cutting of corners certainly is designed to prevent accidents between vehicles at street intersections, and it follows that appellant was guilty of negligence *per se*. *Ludke v. Burck*, 160 Wis. 440, 152 N. W. 190. The trial court further found that appellant's negligence was the proximate cause of the collision. Whatever may have been the proximate cause of the accident we are satisfied that appellant's negligence so contributed to it that he can recover nothing on his counterclaim, and is liable in damages to respondent unless the latter was guilty of contributory negligence.

The trial court made no finding on the issue whether the respondent was guilty of negligence, but did find that his rate of speed was not the proximate cause of his injury. That respondent was guilty of negligence cannot be doubted, since according to his own testimony he was violating sec. 1636—49, Stats. This statute undoubtedly aims in part to prevent collisions between vehicles upon the streets, especially at street intersections, and its violation constituted negligence *per se*. *Ludke v. Burck, supra; Brown v. C. & N. W. R. Co.* 109 Wis. 384, 85 N. W. 271.

It was clearly upon the finding of the civil court that respondent's rate of speed was not the proximate cause of his injuries that the circuit court affirmed the judgment, for that court construed the civil court's findings as embracing a finding of respondent's negligence. The circuit court concluded that there was evidence to sustain this finding upon proximate cause and that it followed as a matter of course that the judgment must be affirmed. In this conclusion the circuit judge took too restricted a view of his power to review the judgment of the civil court. The findings of that

court have the same status upon appeal to the circuit court as findings of the circuit court on appeal to this court. They are not entitled to the same conclusiveness as a verdict of a jury, but will control unless against the clear preponderance of the evidence. *Pabst B. Co. v. Milwaukee L. Co.* 156 Wis. 615, 620, 146 N. W. 879; *Keck v. Michigan Q. S. Co.* 158 Wis. 500, 149 N. W. 208.

The theory upon which the trial judge made this finding appears to be set forth in the following statement in his opinion:

"And the court is further of the opinion that from the nature of the accident and where plaintiff struck the automobile of the defendant, that this particular accident was just as likely to happen had he been going at fifteen miles an hour as though he had gone at twenty-two miles an hour. The evidence shows that the plaintiff struck the defendant's automobile at the front and just as it had rounded the northeast corner of Hadley street and Fond du Lac avenue. Had he been going slower, say fifteen miles an hour, the probabilities are that he would have struck the automobile nearer the center, because it is apparent that he could not stop the motorcycle after he had knowledge of defendant's intention to cut the corner."

The finding must be sustained unless it is against the clear preponderance of the evidence, but we have read the record as well as the printed case and are convinced that the finding is against the clear preponderance. Respondent testified that if he had been going at a lawful rate of speed he could have stopped his motorcycle by its brakes within twenty feet. There are marked discrepancies in his testimony as to his distance from appellant when he saw his danger. When asked how far appellant was from him when appellant made the turn he stated twenty to twenty-five feet. If appellant made a sudden and unannounced turn in front of respondent at such close quarters the court's finding that the injuries would have occurred, whatever respondent's speed, might be supportable. But even then it seems to us that if respond-

ent had been traveling at a lawful rate of speed he would have had a much better chance of avoiding the collision. At least he could have so slackened his speed before the impact that his injuries might have been less severe. It may be added that if the respondent had been going more slowly the appellant would have had a better opportunity to see him in time to avoid the accident.

However, respondent testified in great detail in connection with his Exhibit 1, a diagram of the place of the accident. He testified that he saw appellant when a block distant, and kept looking ahead. He indicated the point where he saw appellant headed towards Hadley street, east of the center of Fond du Lac avenue, and well to the left of the center of the intersection instead of to the right, where he should have been. He understood, when he saw appellant at this point, that the latter was turning into Hadley street and said that he saw that a collision was inevitable. He indicated and described the point where he himself was when he saw this. By comparing distances upon the diagram it appears that this latter point is about fifty-five feet, instead of twenty to twenty-five feet, from the point where appellant was when the danger was seen, is about thirty feet from the point where he testified the collision occurred, and about thirty-five feet from the center of the intersection itself. As respondent testified that he could stop from a legal speed within twenty feet, it appears from his own testimony that had he been going at such a speed he would in all probability have had ample time to stop before the collision, at least time to so slacken his speed that the impact would have had less serious results.

It is true that in one part of respondent's testimony he claims that the collision was unavoidable on his part. But from another part of his evidence, which is relied on to prove the negligence of appellant and which is most relied upon on that issue, it appears that if respondent had not violated the law the accident probably would not have happened.

This portion of the testimony, in which respondent indicated the several positions of the parties upon the diagram, seems to us of controlling weight as compared with his estimate of the distance separating him from appellant when he saw appellant turn in front of him.

It follows that respondent was guilty of negligence which contributed to proximately cause his injuries, and that consequently he cannot recover damages from appellant.

The case of *Maher v. Lochen,* 166 Wis. 152, 164 N. W. 847, confidently relied upon by respondent, might be controlling if we could agree on the facts with the trial court. In the view we take of the facts, however, that case and the cases like it are clearly distinguishable.

By the Court.—Judgment reversed, and cause remanded to the circuit court with directions to enter judgment for defendant dismissing the complaint and the counterclaim.

CHICAGO & NORTHWESTERN RAILWAY COMPANY, Respondent, vs. J. I. CASE PLOW WORKS, Appellant.

December 16, 1920—January 11, 1921.

Carriers: Action to recover freight charges: Negligence of company in declaring freight paid: Estoppel: Unlawful preferences.

In an action against the consignee of an interstate lumber shipment to recover the freight charges thereon, the fact that the railway company's agent negligently delivered an expense bill showing all freight charges prepaid, whereupon the consignee paid the consignor the full contract price, though the lumber was to be delivered at destination f. o. b., is no defense, the interstate commerce act (U. S. Comp. Stat. 1918, § 8565) forbidding common carriers from giving any preference or advantage to any person or subjecting any person to any undue or unreasonable prejudice or disadvantage. To hold that the railway company, by reason of estoppel, might be prevented from collecting the freight due, would violate the rule of public policy thus prescribed.

APPEAL from an order of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Affirmed.*

This is an action to recover freight charges on a carload of lumber consigned by the E. C. Bradley Company of Cincinnati, Ohio, to the appellant, *J. I. Case Plow Works,* of Racine, Wisconsin.

The plaintiff alleges that on November 4, 1914, there was delivered to the Alabama & Great Southern Railway Company at Toomsuba, Mississippi, a carload of lumber by the firm of Smith & Brewster as consignors, to be transferred over the lines of that company and its connecting carriers to the defendant at Racine, Wisconsin; that the lawful charge for such transportation was $206.01, no part of which has ever been paid.

The defendant, by way of separate defense, alleges a contract entered into between the defendant and the E. C. Bradley Lumber Company of Cincinnati, Ohio, by which the latter company sold to the defendant the lumber in question to be delivered to the defendant f. o. b. Racine, Wisconsin; that at the time of the delivery of the lumber to the defendant plaintiff's freight agent negligently delivered to the defendant an expense bill which stated that all freight charges on said car had been paid, and that in reliance upon such statement the defendant paid the full amount of the contract price of said lumber to the E. C. Bradley Lumber Company, making no deduction on account of freight charges.

To this separate defense the plaintiff demurred, which demurrer was sustained. This is an appeal from such demurrer.

For the appellant there was a brief by *Quarles, Spence & Quarles,* attorneys, and *Howard T. Foulkes,* of counsel, all of Milwaukee; and the cause was argued orally by *Mr. Foulkes.*

For the respondent the cause was submitted on the brief of *R. N. Van Doren* of Milwaukee.

SIEBECKER, C. J. Do the facts alleged in the separate defense constitute a defense by way of estoppel precluding the railroad company from collecting the freight charges fixed by law from defendant on this interstate shipment? The trial court held that the negligence of plaintiff's agent at Racine in presenting an expense bill to defendant which showed that the freight charges for this shipment had been paid does not constitute an estoppel precluding collection of its claim for freight charges from the defendant. Such charges had not in fact been paid, but defendant in reliance on such incorrect bill paid the Bradley Company the price of the carload of lumber without deducting these freight charges which the Bradley Company had agreed to pay. The interstate commerce act (U. S. Comp. Stat. 1918, § 8565) forbids common carriers from giving any preference or advantage to any person or subjecting any person to any undue or unreasonable prejudice or disadvantage in any respect whatsoever in the conduct of its transportation business.

"The all-embracing prohibition against either directly or indirectly charging less than the published rates shows that the purpose of the statute was to make the prohibition applicable to every method of dealing by a carrier by which the forbidden result could be brought about." *New York, N. H. & H. R. Co. v. Interstate Comm. Comm.* 200 U. S. 361, 26 Sup. Ct. 272.

In *Texas & P. R. Co. v. Leatherwood,* 250 U. S. 478, 39 Sup. Ct. 517, the court declared:

"That a carrier cannot be prevented by estoppel or otherwise from taking advantage of the lawful rate properly filed under the interstate commerce act is well settled. A carrier has, for instance, been permitted to collect the legal rate, although it had quoted a lower rate and the shipper was ignorant of the fact that it was not the legal rate."

And in *A. J. Phillips Co. v. G. T. W. R. Co.* 236 U. S. 662, 35 Sup. Ct. 444, it is stated:

"The prohibitions of the statute against unjust discrimina-

tion relate not only to inequality of charges and inequality of facilities, but also to the giving of preferences by means of consent judgments or the waiver of defenses open to the carrier."

It is manifest that the negligent presentation by plaintiff's agent of an erroneous expense bill to defendant for the shipment in question could be made the means of avoiding the legal tariffs for its service as carrier if it should be held to be estopped from collecting the freight charges when demanded of defendant as consignee of the lumber. The right to private contract between shipper and carrier is wholly abrogated by the interstate commerce act, and the rates fixed by law are enforceable by the carrier by force of law. Unlawful acts of a carrier's agents in connection with charging and collecting the legal rates for transportation cannot be made the foundation of an estoppel to prevent the carriers from enforcing the legal rate against those liable therefor. In *New York, N. H. & H. R. Co. v. York & W. Co.* 215 Mass. 36, 102 N. E. 366, the court says:

"The public policy thus declared supersedes the ordinary doctrine of estoppel, so far as that would interfere with the accomplishment of the dominant purpose of the act. It does not permit that inequality of rates to arise indirectly through the application of estoppel, which it was the aim of the act to suppress directly."

See, also, *Baltimore & O. S. W. R. Co. v. New Albany B. & B. Co.* 48 Ind. App. 647, 94 N. E. 906, and *Central of Georgia R. Co. v. Birmingham S. & B. Co.* 9 Ala. App. 419, 64 South. 202.

The trial court properly sustained the demurrer to the separately alleged defense.

By the Court.—The order appealed from is affirmed.

SCHEUER & TIEGS, INC., Respondent, vs. BENEDICT, Appellant.

December 16, 1920—January 11, 1921.

Landlord and tenant: Tenancy from month to month: Termination: Notice to quit: When term ends.

1. Under a tenancy from month to month, a notice to quit must be to terminate the tenancy at the end of the month and not before.
2. Where defendant was a tenant from month to month, whose rent was payable on the first day of each month, plaintiff's notice to quit, served on defendant March 5, 1920, "You are hereby notified and required by April 30, 1920, to quit and deliver up possession" of the premises, was sufficient, as terminating the tenancy at the end of the month and not before, for the word "by" in such notice would be construed, in favor of the validity of the notice, to include April 30th, that is, to include the day or date marking the boundary of time, especially since the verb used with it denoted present or continuing rather than completed action.
3. The reasonable construction of a term having two meanings is the one which gives validity to the thing sought to be done rather than the one which makes the act nugatory.

APPEAL from a judgment of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Affirmed.*

Action begun in the civil court to recover possession of certain premises originally leased to defendant under a written lease expiring April 30, 1919. By an oral arrangement defendant was permitted to hold from month to month after the expiration of the written lease. The rent was payable on the first day of each month. On March 5, 1920, plaintiff served this notice on defendant: "You are hereby notified and required by April 30, 1920, to quit and deliver up possession of the premises now held by you as our tenant, being known as 400 Fifth avenue, Wauwatosa, Wisconsin." Defendant did not vacate on April 30th and this action was begun. The civil court entered a judgment for plaintiff, and defendant appealed to the circuit court, where the judg-

ment of the civil court was affirmed. From such judgment the defendant appealed to this court.

Oscar Kroesing of Milwaukee, for the appellant.

A. W. Foster of Milwaukee, for the respondent.

VINJE, J. The objections that plaintiff is not the real party in interest and so cannot maintain the action; that the tenancy was not from month to month; and that a slight error in the description of the leased premises invalidated the action, are not well taken. They are not of sufficient importance to merit treatment and we mention them only to show they have not been overlooked.

The serious question is as to the sufficiency of the notice to quit. It requires that possession be delivered by April 30. April 30 was the last day of the tenancy from month to month, and if, as is argued, "*by* April 30" is meant before April 30, then the notice is insufficient, because under a tenancy from month to month the notice must be to terminate the tenancy at the end of the month and not before. *State ex rel. Engle v. Hilgendorf,* 136 Wis. 21, 116 N. W. 848; *Sutherland v. Drolet,* 154 Wis. 619, 143 N. W. 663; *Molter v. Spencer, ante,* p. 38, 180 N. W. 261. The word *by* as marking the completion of the time required or assigned for the performance of an action, according to Murray's Dictionary, means "On or before, not later than, within." Webster's International gives "At or before, not later than." When used with a verb in the perfect tense the word "by" more naturally denotes a completed action at the time boundary marked by it, as "The work must be finished by Friday." On the other hand, "The work must finish by Friday" perhaps more naturally means including Friday. In the notice in question the word "by" is used with the verb "to quit and deliver up," denoting present tense and not completed action. In view of that and of the further fact that it must be presumed a valid notice was intended to be given, we reach the conclusion that "by April 30" in

the notice included April 30. Under our decisions, as before stated, the notice would not be sufficient if construed as defendant's counsel contends; hence, conceding that the term has two meanings, one including the date expressed and the other excluding it, the reasonable construction is the one that gives validity to the thing sought to be done, for no one ought to presume that a nugatory act is intended.

The following cases found in Words and Phrases under the title "By," denoting on or before, have held, in the context considered, that the word "by" excluded the day or date set as a boundary of time: *Express Pub. Co. v. Aldine Press,* 126 Pa. St. 347, 17 Atl. 608; *Rankin v. Woodworth,* 3 Pen. & W. 48; *Wilson v. Rodeman,* 30 S. C. 210, 8 S. E. 855; *Miller v. Phillips,* 31 Pa. 218.

These cases, also found in Words and Phrases, have held that the day or date marking the boundary is included: *Coonley v. Anderson,* 1 Hill (N. Y.) 519; *Wachsmuth v. Routledge,* 36 Oreg. 307, 51 Pac. 443; *Elizabeth City C. Mills v. Dunstan,* 121 N. C. 12, 27 S. E. 1001; *Higley v. Gilmer,* 3 Mont. 433; *Ruprecht v. Delacamp,* 165 Fed. 381; *Weir v. S. & J. T. Clark,* 4 Ala. App. 302, 58 South. 793; *Dukes v. Gore & Co.* 11 Ga. App. 743, 76 S. E. 365; *Goldman v. Broyles* (Tex.) 141 S. W. 283.

By the Court.—Judgment affirmed.

ZEININGER, Respondent, vs. PREBLE, Administrator, Appellant.

December 16, 1920—January 11, 1921.

Landlord and tenant: Landlord's duty to keep buildings safe: Injury to tenant: Evidence.

1. Under sec. 2394—48, Stats., requiring every employer and every owner of a public building to construct and maintain it so as to render the place or building safe, the owner of an apartment house, which was a public building as defined by sub.

(12), sec. 2394—41, is liable to a tenant for injuries resulting from the unsafe condition of a passageway, regardless of the landlord's liability at common law and without the industrial commission having taken any action to enforce the section.

2. Uncontradicted evidence that the floor of an upstairs porch in an apartment building was not reasonably safe, that no inspection had been made as ordered, and that while the defect might have been discovered by a proper inspection it was not plainly visible to the unpracticed observer, shows the failure of the landlord to perform her statutory duty as the owner of a public building to maintain the passageway in a reasonably safe condition.

APPEAL from a judgment of the circuit court for Milwaukee county: JOHN J. GREGORY, Circuit Judge. *Affirmed.*

The plaintiff was a tenant from month to month of apartment No. 16, No. 206 Ninth street, in the city of Milwaukee. The plaintiff's apartment was situated on the fourth floor, and at the rear opened on a porch which was used as a common passageway by the plaintiff and other tenants. The building in which the plaintiff's apartment was situated contained in all thirty-five apartments. The porch in question was at the rear and extended north and south. At either end of the porch was a stairway leading to the porch below. On the 29th day of August, 1917, while the plaintiff was engaged in hanging out clothes on the porch, the floor gave way, and she received the injuries complained of. The jury found, first (by direction of the court), that the floor of the porch was defective and unsafe; second, the owner, in the exercise of ordinary care, ought to have known of such condition in time to have repaired the same prior to the accident; third, that the failure of the owner, in the exercise of ordinary care in that regard, was the proximate cause of the injury; fourth, that the plaintiff was not guilty of any negligence contributing to her injury; and fifth, assessed plaintiff's damages at $3,500. There were the usual motions on the part of the defendant, which were denied, and judgment was entered for the plaintiff, from which the defendant appeals.

Louis A. Dahlman of Milwaukee, for the appellant.

For the respondent there was a brief by *Van Dyke, Shaw, Muskat & Van Dyke* of Milwaukee, and oral argument by *James D. Shaw.*

ROSENBERRY, J. The main contention of the defendant here is that a landlord is not liable to a tenant for injuries resulting from a lack of repairs unless he has expressly contracted to repair or unless the defect is a concealed one known to the landlord and not disclosed to the tenant and not discoverable by the latter by the use of that degree of care which the law demands, citing *Cole v. McKey,* 66 Wis. 500, 29 N. W. 279; *Dowling v. Nuebling,* 97 Wis. 350, 72 N. W. 871; *Fellows v. Gilhuber,* 82 Wis. 639, 52 N. W. 307; *Kurtz v. Pauly,* 158 Wis. 534, 149 N. W. 143; and *Anderson v. Hayes,* 101 Wis. 538, 77 N. W. 891.

We do not find it necessary in this case to consider or determine the liability of a landlord at common law for failure to repair, or whether or not he is in duty bound to repair, and, if so, under what circumstances. Sub. (12), sec. 2394—41, Stats., defines a public building as any structure used in whole or in part as a place of resort, assemblage, lodging, trade, traffic, occupancy, or used by the public, or by three or more tenants. The building here in question was occupied by a large number of tenants and was, within the statutory definition, a public building.

By sec. 2394—48, Stats., it is provided:

"Every employer and every owner of a place of employment or a public building now or hereafter constructed shall so construct, repair or maintain such place of employment or public building, and every architect shall so prepare the plans for the construction of such place of employment or public building, as to render the same safe."

That part of sec. 2394—48 applicable to public buildings was referred to in *Hommel v. Badger State Inv. Co.* 166 Wis. 235, 165 N. W. 20. But in that case the relation of

landlord and tenant did not exist. The argument made here is that secs. 2394—41 to 2394—71, inclusive, simply confer upon the industrial commission of Wisconsin the right to investigate, ascertain, and determine by general order such classification of persons, employment, places of employment, and public buildings as shall be necessary to carry out the purpose of the statute, and that liability on the part of the owner of a public building for failure to comply with the statute must therefore await some action on the part of the industrial commission. We think this position untenable. While the statute has not been construed in a case where the relationship of landlord and tenant existed, it has been many times applied where the relationship was that of employer and employee. It has been uniformly held that the statute of its own force imposed upon the employer liability for all injuries resulting from hazards, risks, and dangers incident to the business due to an unsafe place, however open and obvious such hazards, risks, and dangers might be to the employee (*Besnys v. Herman Zohrlaut L. Co.* 157 Wis. 203, 147 N. W. 37; *Langos v. Menasha P. Co.* 156 Wis. 418, 145 N. W. 1081); and there are many other cases to the same effect. The language of the statute with reference to the duty of an employer to maintain a place of employment that is reasonably safe is the same as that which imposes upon a landlord or other owner of a public building the duty to maintain the structure in a reasonably safe condition. No reason why the statute should apply in one case and not in the other is pointed out, and we see none. It is held, therefore, that the statute applies.

It appears from the uncontradicted evidence that the floor of the passageway was not reasonably safe. Although an inspection had been ordered none had been made, and while the defect might have been discovered by a proper inspection by tapping or otherwise, it was not one that was plainly visible to the unpracticed observer. Whatever the duty of the defendant's decedent may have been as landlord,

it was her duty, as the owner of a public building, to maintain the passageway in a reasonably safe condition. This she failed to do.

The defendant further contends that there is no evidence of the decedent's negligence, or at least not sufficient evidence to sustain the verdict, aside from the photograph of the passageway in question taken after repairs to the passageway were made following the accident, and that the verdict, therefore, cannot be sustained. Without discussing whether or not the photograph was properly admissible as tending to establish the defective condition of the floor, we are of opinion that there is ample evidence to sustain the finding that the floor in the passageway was defective and unsafe. The defendant's contention on this point must be overruled.

There being ample evidence to sustain the verdict, the judgment of the trial court was right.

By the Court.—Judgment affirmed.

WOMEN'S CATHOLIC ORDER OF FORESTERS, Respondent, vs. KRIVITZ, imp., Appellant.

December 17, 1920—January 11, 1921.

Interpleader: Several claimants to insurance benefits: Deduction of attorney's fees and costs from proceeds of policy: Appeal: Effect of consenting to order.

1. The assertion of a claim to life insurance both by the beneficiary named in the policy and by the legatee of the insured and failure of either to bring an action for over ten months, is *held* to warrant the insurer in bringing an action of interpleader against them.
2. One of two defendants against whom an interpleader action was brought, having formally consented to the granting of the relief prayed for, cannot on appeal question the right or propriety of plaintiff's instituting the action or being allowed the relief asked.

3. Persons claiming under a life insurance policy are bound by a by-law of the insurer, a part of the contract between the insurer and the insured, providing for a deduction by the insurer of its court costs and attorney's fees incurred in determining to whom the insurance shall be paid.

APPEAL from an order of the circuit court for Milwaukee county: GUSTAVE G. GEHRZ, Circuit Judge. *Affirmed.*

One Mary Krivitz was insured by the plaintiff, and her daughter, the defendant Mary Krivitz, now Mrs. Svensson, designated beneficiary. April 14, 1919, the insured died leaving by specific bequest the proceeds of the same policy to her former husband, the defendant *Anton Krivitz,* from whom she had been divorced.

On April 21st claim was made to plaintiff on behalf of the daughter with the usual death certificate. On April 22d the attorney for *Anton Krivitz* notified the plaintiff that it should pay the proceeds of the policy to no one except his client, who claimed under the will. July 3d the attorney for the appellant again wrote stating that immedately upon the appointment of an executor, which it was expected would be done in the following September, legal proceedings would be commenced, and suggesting to plaintiff that for its own protection it hold the fund and not pay it over until a judicial determination had been made.

A by-law of plaintiff in force at the time of the issuing of the policy was as follows:

"When more than one claimant demands a benefit as provided in this constitution, there shall be deducted from the full amount of said benefit so otherwise to be paid to the legal beneficiary or beneficiaries, and there shall be retained by the order therefrom all court costs, reasonable attorneys' or solicitors' fees and all actual expenses incurred by this order in determining who shall be paid the said benefits, and there shall be due in such case, as such benefit, only such amount as remains after deducting therefrom all of said expenses, fees, and costs as aforesaid."

Neither of the claimants commenced any proceeding against the plaintiff, and in the following January this action was brought, the complaint reciting the situation and asking that the defendants be required to interplead concerning their claims and that the plaintiff be authorized to pay the amount of the policy into court, less the proper deduction to be made under the by-law above quoted, and upon such payment to be discharged from all liability to either or both of said defendants.

The defendant Mrs. Svensson filed an answer admitting the allegations of the complaint and that it was a proper case for an interpleader and consented that the plaintiff pay to the clerk the amount of the insurance policy less its costs, disbursements, and attorney fees to be allowed by the court, and further praying for leave to litigate with the other defendant the issue as to ownership of said insurance money.

The appealing defendant, *Anton Krivitz,* filed an unverified pleading on February 23, 1920, consenting that the plaintiff pay the sum of money into court and "that the relief prayed for by the plaintiff in the complaint shall be granted." No objection was made by either party on the ground that the action was not properly brought by the plaintiff.

Upon motion of the plaintiff a hearing was had as to the amounts that should be allowed the plaintiff.

The trial court directed that the plaintiff be permitted to have its taxable costs and disbursements, assessed at $69.08, and the sum of $75 as a reasonable attorney fee, making a total of $144.08. The amount of the insurance less this amount was paid by the plaintiff to the clerk of court and an order made discharging it from further liability. The defendants stipulated that such deduction should be assessed against the losing party in the final judgment.

The defendant *Anton Krivitz* appeals to this court from so much of said order as permits the retention by plaintiff of the $75 and also of the sum of $69.08.

For the appellant there was a brief by *Joseph G. Hirschberg,* attorney, and *Horace B. Walmsley,* of counsel, both of Milwaukee; and the cause was argued orally by *Mr. Walmsley.*

Vincent D. Hennessey of Milwaukee, for the respondent.

ESCHWEILER, J. The appellant insists that there was no sufficient legal cause or reason for plaintiff bringing this action, and in any event the several amounts allowed for costs and disbursements and attorney's fees were each unreasonably large.

The assertion by appellant that he was determined to hold the plaintiff for the amount of the policy and his statement that he would bring an action to recover the amount; the assertion by the daughter of her right to the same fund; the length of time that was permitted to elapse after such respective assertions, and the failure of either claimant to institute proceedings, one against the other, or against the plaintiff, whereby the plaintiff might have paid the money into court and have been summarily relieved of liability, fully justified and warranted the plaintiff in bringing the very action that it did.

Furthermore, the appellant, having formally consented that the relief prayed for in the complaint should be granted, is in no position now to be permitted to question the right or propriety of plaintiff instituting the action or being allowed this relief.

The deduction was made solely by reason of the above quoted by-law, a part of plaintiff's contract with the insured, and the defendants asserting their rights under such contract are necessarily bound by its conditions.

An examination of the record shows no ground for disturbing the conclusion arrived at by the trial court as to the respective amounts of costs and disbursements and attorneys' fees.

By the Court.—Order affirmed.

TOWN OF STEPHENSON, Respondent, vs. SCHELK and another, Appellants.

December 17, 1920—January 11, 1921.

Workmen's compensation: Construction of statute: Negotiations with tortfeasor as waiver of compensation from employer.

1. Sec. 2394—25, Stats. 1917 (the workmen's compensation act), should be liberally construed to afford workmen a remedy for meritorious claims.
2. Where an employee of a town was injured while working on one of its roads by being shot by one or the other of two campers firing at a target, mere negotiations with the campers as to what he would accept in settlement, unaccompanied by a demand or a notice that if they did not pay he would take further steps against them, do not constitute a "claim" against a third person for damages within the meaning of sub. 2, sec. 2394—25, Stats. 1917, operating as a waiver of any claim for compensation against the employing town; the word "claim" meaning a demand of some matter as of right, made by one person upon another to do or forbear to do some act or thing as a matter of duty.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Reversed.*

Action to review an award of the *Industrial Commission,* given under the workmen's compensation act, secs. 2394—3 to 2394—31, Stats., by which the plaintiff town was ordered to compensate the defendant, its employee, for injuries. The trial court set aside the award and the employee brings this appeal.

Appellant *Schelk* was in the service of the respondent town on July 18, 1918, working upon a road which was considerably used for travel. It appears to have been in a region sparsely settled and frequented by hunters in season. It was not hunting season, however, in July. Near by, but hidden by brush from the portion of the road where appellant was at work, was a place where it appeared fishermen and sportsmen frequently camped. There was evidence that shooting, probably target shooting, was frequently heard

in the neighborhood. Appellant had heard none near this camping place, however, in the three days he had worked there until the injury occurred, and never gave it a thought that he might get shot there.

While appellant was working he heard a shot and heard the bullet pass near him. He called out with the intention of attracting the attention of the shooters, but a second shot was heard and the bullet struck him, causing the loss of an eye.

Appellant went in the direction of the shooting and found two campers, one McDonald and one Stibbe, who admitted having fired the shots. They had both fired several shots with a twenty-two caliber rifle at a target in front of the brush not knowing that there was a road behind it and thinking that there would be nobody there. They did not know which of them had fired the shot which struck appellant.

The campers took appellant in their automobile to medical attendance and a hospital. They voluntarily paid the medical and hospital expenses themselves without informing appellant until later.

It appears to have been nearly a year after the injury before appellant took further action except to inform the chairman of the town about his injury. Then he consulted a lawyer or two. It does not appear very clearly just what advice he received, except an opinion that McDonald and Stibbe could be held liable and advice that there might be doubts about recovery from them. He knew that there was a compensation act under which there would be possibility of his recovering compensation from the town; a lawyer he consulted seems to have suggested proceeding under it. He desired to escape antagonizing the town, however, and figured he was going to make McDonald and Stibbe pay for it instead. He really did not intend to make claim against the town until after certain occurrences which led up to the claim on which the present award was given.

With this the situation, the appellant went to one of the men who did the shooting. The exact language used does not clearly appear, but the upshot of it was that he asked what they intended to do about compensation, or if they intended to compensate him, and said that if they wanted to settle he would accept $1,000 plus lost wages and expenses as a settlement. He never wrote to them. They promised to let him know soon what they would do. Accordingly appellant received a letter asking him to come to Oconto. When he arrived McDonald and Stibbe took him to a friend, now appellant's counsel. The lawyer seems to have been acting as friend rather than retained by anybody at this time. He asked what appellant wanted in settlement. Appellant repeated his willingness to settle for the same amount as previously proposed. The lawyer then told him that while he might get judgment against McDonald and Stibbe, they had no property, could go into bankruptcy, and that it would be very doubtful if he would ever recover anything. The lawyer then suggested a claim against the town under the act and the present claim resulted.

The *Commission*, in an opinion without findings of facts so designated, state that the negotiations with McDonald and Stibbe did not amount to "the making of a claim" within the meaning of sub. 2, sec. 2394—25, Stats. 1917, which would operate as a waiver of any claim against respondent. They also state, though it appears with some hesitation, that there was such evidence of camping and shooting in the neighborhood that, together with "the well recognized practice of campers and sportsmen to engage in target shooting," and considering the location of the road, being shot accidentally became a special hazard of appellant's employment.

The trial court set aside the award on the ground that the *Commission* acted without and in excess of its powers in finding that no claim had been made against the third persons, holding that the evidence indisputably showed the

making of such a claim. He did not consider, in his memorandum opinion, the question of whether the danger of being shot was such as to become a hazard of the business so as to make the occurrence an industrial accident.

Counsel in their briefs upon this appeal argue only upon the question on which the trial court set aside the award; they do not discuss the other point.

For the appellant *Schelk* there was a brief by *Classon & Whitcomb* of Oconto.

For the appellant *Industrial Commission* there were briefs by the *Attorney General* and *Winfield W. Gilman,* assistant attorney general, and oral argument by *Mr. Gilman.*

For the respondent there was a brief by *Miller & Miller* of Marinette, and oral argument by *Edward W. Miller.*

JONES, J. No claim has been made in the argument or brief of the respondent town that the appellant did not have a meritorious claim against the town under the workmen's compensation act, although it seems to have been urged before the *Commission* that the injury was not one incidental to the employment.

Appellant clearly had a cause of action against the person who fired the shot. He may have had doubts whether he had a cause of action against both McDonald and Stibbe, and, if not, whether he could have proved who discharged the shot. Before he fully determined on the best course to pursue he became convinced of the difficulties in the way of obtaining compensation from McDonald and Stibbe. Naturally his first thought was that these parties or one of them should make compensation.

Although appellant preferred obtaining compensation from McDonald and Stibbe to antagonizing the town, they never made him any definite offer and he never accepted any proposition made by them. His proposal was not accepted and was abandoned. He was willing to negotiate

with them and would have accepted $1,000 and his expenses if they had been willing and able to make the payment. Before any conclusion was reached they took the claimant to their lawyer friend and he became satisfied that his most certain remedy was against the town. One of the facts determining his course of action was the doubt whether a judgment against McDonald and Stibbe would be collectible. Appellant never told McDonald and Stibbe that he demanded any certain payment. Even if he hoped that they would pay him he did not notify them that he should prosecute a claim against them if they did not pay. Although he consulted an attorney as to his rights against them, no demand was made or notice given by any attorney.

There is undoubtedly considerable force in the argument that appellant made a claim against McDonald and Stibbe. But the real question is whether it was such a claim as, within the meaning of the statute, forfeited or waived appellant's claim against the town. The statute existing at the time (Stats. 1917) was as follows:

"Section 2394—25. 1. The making of a lawful claim against an employer for compensation under sections 2394—3 to 2394—31, inclusive, for the injury or death of his employee shall operate as an assignment of any cause of action in tort which the employee or his personal representative may have against any other party for such injury or death; and such employer may enforce in his own name the liability of such other party.

"2. The making of a claim by an employee against a third party for damages by reason of an accident covered by sections 2394—3 to 2394—31, inclusive, shall operate as a waiver of any claim for compensation against the employer."

The statute should be liberally construed. *White v. Industrial Comm.* 167 Wis. 483, 485, 167 N. W. 816, and cases cited. It should be so construed as to afford workmen a remedy for meritorious claims; not so construed as to deprive them of just compensation merely because they discuss and investigate their remedies or even because they

may have had some negotiations with parties other than the employer when these negotiations have led to no result and have brought no detriment to the employer. A "claim" is frequently defined judicially as "a demand of some matter as of right, made by one person upon another to do or forbear to do some act or thing as a matter of duty." See Words & Phrases, title "Claim." The word seems to contemplate something rather unequivocal, something in the nature of a demand rather than a request. At least this would seem to be the proper meaning of the word in a statute like this, where, by a stricter construction, an employee through ignorance of the law might forfeit a just claim by having conversations and negotiations with another than his employer.

The only case cited which bears directly upon the questions involved is *Harloff v. Merwin,* 172 Wis. 30, 177 N. W. 913, 915. In that case it was held that claimant had made his election to pursue his remedy against a third party. But the proof showed that his attorney had written several letters showing that such a claim had been made, and the employee had actually received $1,200 from the third party and given a release in full.

No claim is made that the payment of the medical and hospital expenses by McDonald and Stibbe without the knowledge of appellant bars his claim.

By the Court.—Judgment of the circuit court is reversed, and the cause is remanded with instructions to affirm the award of the *Industrial Commission,* with costs to be paid by the respondent town.

MILLER SCRAP IRON COMPANY and another, Appellants, vs. BONCHER and another, Respondents.

December 17, 1920—January 11, 1921.

Workmen's compensation: Death of employee: Action by personal representative against third person: Waiver by widow of right to compensation: Industrial commission: Failure to make findings as to immaterial facts: Effect.

1. The act of the administratrix of the estate of a deceased employee in bringing a common-law action against the superintendent of the employing company, who was driving an automobile in which the employee was riding at the time of the accident, to recover damages for his death under secs. 13702 and 13703, Howell's Michigan Statutes, is *held* not to have waived the right of the widow of the deceased to claim compensation from the employer under the Wisconsin workmen's compensation act.
2. The administratrix being charged with the duty of collecting the assets of the estate and subject to no direction except by the court which appointed her, requests, suggestions, or advice by the widow in reference to the prosecution of the common-law action are immaterial, as the administratrix had absolute control over it.
3. Where the facts pleaded before the industrial commission by the employer and insurer as a defense to the widow's application for compensation for the death of her husband constituted no defense, the commission was not required to make findings with reference thereto, and its failure so to do is therefore immaterial.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

The appeal is from a judgment of the circuit court confirming an award of the *Industrial Commission* made September 22, 1919, and confirming an order of the *Industrial Commission* made November 24, 1919, refusing to vacate said award of September 22d. The award was for $3,000 in favor of *Mary Boncher* and against the *Miller Scrap Iron Company* and *Georgia Casualty Company,* as compensation under the workmen's compensation act for the death of Joseph Boncher, husband of *Mary Boncher,* while in the

employ of the *Miller Scrap Iron Company*. The accident resulting in death occurred in the state of Michigan, where and while Boncher was in the employ of the *Miller Scrap Iron Company*. The parties were residents of the state of Wisconsin, where the contract of employment was made and where the principal services under such contract of employment were to be performed. Both parties were subject to the provisions of the workmen's compensation act.

Shortly after the death of Joseph Boncher, *Mary Boncher* procured the appointment of an administratrix of his estate in the county court of Brown county, and the administratrix commenced and prosecuted a common-law action against the *Miller Scrap Iron Company* and Herman Miller, who was superintendent of said company and who was driving the automobile in which Joseph was riding at the time of the accident, to recover damages for the death of said Joseph Boncher, basing the action upon a statute of the state of Michigan providing for damages in case of death by wrongful act, similar to our sec. 4255. A judgment was obtained in the lower court, which was reversed in this court (*Anderson v. Miller Scrap Iron Co.* 169 Wis. 106, 170 N. W. 275, 171 N. W. 935) as to the defendant *Miller Scrap Iron Company* for the reason that the liability of said company for the death of Boncher was governed by the terms of the Wisconsin workmen's compensation act. At the request of the plaintiff in that action, and for no other reason, judgment was also reversed as to Herman Miller. The case was remanded to the municipal court of Brown county, where Herman Miller moved to dismiss the action upon its merits as to him. Thereupon the plaintiff in that action tendered the prosecution thereof to the *Miller Scrap Iron Company*, which was declined. The *Miller Scrap Iron Company* as well as the plaintiff, however, resisted the motion to dismiss the action as to Herman Miller, but the motion was granted.

After the decision of this court in the common-law action *Mary Boncher* applied to the *Industrial Commission* for compensation. The *Miller Scrap Iron Company* and the

Georgia Casualty Company, its insurer, were made respondents, and they filed separate answers. The substance of the defense made by each of the respondents (appellants here) was that by the commencement of the common-law action by the administratrix of the estate of Joseph Boncher, *Mary Boncher* had waived her right to compensation under the workmen's compensation act. On September 17, 1919, the *Industrial Commission* made an award granting compensation to *Mary Boncher* in the sum of $3,000. On September 22, 1919, the *Commission* having discovered that part of the first award did not run against the *Georgia Casualty Company* as well as the *Miller Scrap Iron Company,* an amended award was made correcting the error in that respect. On September 27, 1919, the present plaintiffs applied to the *Industrial Commission* for an order vacating the award, basing the application on the ground that after said amended award, and on the 24th day of September, 1919, the common-law action had been dismissed as to Herman Miller in the municipal court of Brown county, which action prejudiced the rights of these plaintiffs and which prejudice resulted from the acts of *Mary Boncher* in having prosecuted the action to judgment and then having such judgment voluntarily reversed as to him. The application was denied. Separate actions were then commenced in the circuit court for Dane county to review the awards of September 17th and 22d and the order refusing to vacate the same. These actions were later consolidated. From a judgment of the circuit court for Dane county confirming the orders and awards of the *Industrial Commission* plaintiffs bring this appeal.

For the appellants there were briefs by *Richmond, Jackman, Wilkie & Toebaas* of Madison, and oral argument by *Harold M. Wilkie.*

For the respondent *Boncher* there was a brief by *Kaftan & Reynolds* of Green Bay, and oral argument by *R. A. Kaftan.*

For the respondent *Industrial Commission* there was a

brief by the *Attorney General* and *J. E. Messerschmidt,* assistant attorney general, and oral argument by *Mr. Messerschmidt.*

OWEN, J. It is appellants' contention that the award made by the *Industrial Commission* should be vacated and set aside because the prosecution of the common-law action by the administratrix of the estate of Joseph Boncher against the *Miller Scrap Iron Company* and Herman Miller to recover damages for his death operated as a waiver on the part of *Mary Boncher* of any claim for compensation against the *Miller Scrap Iron Company* under the workmen's compensation act, secs. 2394—25 to 2394—31, inclusive. Their argument in this behalf is based on the provisions of sub. 2, sec. 2394—25, Stats. 1919, which provides that "the commencement of an action by an employee against a third party for damages by reason of an accident covered by secs. 2394—3 to 2394—31, inclusive, or the adjustment of any such claim, shall operate as a waiver of any claim for compensation against the employer." It is to be observed that the express terms of this statutory provision do not provide that the commencement of an action by a personal representative of a deceased employee against a third person shall operate as a waiver, on the part of the personal representative, of any claim for compensation against the employer for the death of the employee. Appellants contend that, although not so expressly stated, nevertheless the statute should be so construed in order to carry out the manifest legislative intent. Our views with reference to this will appear as we proceed.

The original action brought by the administratrix was based on secs. 13702 and 13703 of Howell's Michigan Statutes, which provided, in effect, that whenever the death of a person shall be caused by wrongful act which would, if death had not ensued, have entitled the party injured to maintain an action therefor, the person who would have been liable if death had not ensued shall be liable to an action for

damages notwithstanding the death, which shall be brought by and in the name of the personal representatives of such deceased person. It was also provided that the amount recovered in any such action should be distributed to the persons and in the proportions provided by law in relation to the distribution of personal property left by persons dying intestate. The money recovered in an action so authorized constitutes assets of the estate. *Findlay v. C. & G. T. R. Co.* 106 Mich. 700, 64 N. W. 732; *Carbary v. Detroit U. Ry.* 157 Mich. 683, 122 N. W. 367. The widow had no peculiar interest in the money which might have been recovered in that action. Her interest therein was no different from that of her interest in any other personal property asset of the estate. Heirs, whether dependent or not, were entitled to participate in the amount recovered. The trial of that action, therefore, was entirely with the administratrix. She was subject to no direction or control except by the court which appointed her. If this cause of action constituted an asset of the estate, it was the duty of the administratrix to prosecute it if it seemed to be the beneficial thing to do from the standpoint of the estate. The widow enjoyed no power of direction or control over the action of the administratrix in this respect. If this be true, it is difficult to perceive why anything which the administratrix might have done in that action should be construed as a waiver on the part of the widow to compensation under the workmen's compensation act.

It was the duty of the administratrix to act for the benefit of the estate and not for the benefit of the widow. If there was a conflict between the interest of the widow and the interest of the estate, she had but one course to pursue, and that was to be faithful to the interest of the estate without regard to its effect upon the interest of the widow. Counsel for appellants seem to appreciate this legal truth, but they rely upon the fact, as asserted by them, that *Mrs. Boncher* had procured the appointment of the administratrix, had in-

duced the commencement of the common-law action, had participated in that case throughout and had controlled the same, and after judgment was obtained against Herman Miller she had procured a reversal of such judgment, to the prejudice of the *Miller Scrap Iron Company* and the *Georgia Casualty Company*. Of course as a matter of law *Mrs. Boncher* had no control whatever over that action. The administratrix had absolute control over it, and *Mrs. Boncher* had no legal power or control over the administratrix. It matters not what the moral influence of *Mrs. Boncher* was over the administratrix or the extent to which the administratrix deferred to the requests, suggestions, and advice of *Mrs. Boncher* in the prosecution of that case. Whatever was done by the administratrix was done upon her own responsibility, in a legal sense, and she alone can be held to an account of the manner in which she had discharged her duties towards the estate.

Compensation under the workmen's compensation act belongs exclusively to the dependents of the deceased,—in this case his widow. Such compensation does not become assets of the estate, and the administrators of the estate have nothing to do with it. The liability of Herman Miller and that of the *Miller Scrap Iron Company* are not only distinct liabilities arising from different considerations, but they are liabilities to different parties. The liability of Herman Miller is to the estate of the deceased under the Michigan statute. The liability of the *Miller Scrap Iron Company* is to the widow under the Wisconsin workmen's compensation act. There is no logic which will justify the conclusion that the prosecution of the action by the administratrix against Herman Miller for the benefit of the estate can operate as a waiver by the widow of her right to compensation under the Wisconsin workmen's compensation act against the *Miller Scrap Iron Company*. The language of the statute does not expressly declare a waiver under such circumstances, and the foregoing considerations are suffi-

cient reasons for us to decline to so construe it. Waiver is generally defined as the voluntary relinquishment of a known right, and it must be predicated upon the conduct of the party charged therewith. To say that *Mrs. Boncher* waived her right to compensation because the administratrix prosecuted the common-law action would be a misuse of the term. The action of the administratrix cannot constitute waiver on the part of *Mrs. Boncher* according to the ordinary significance of that term. If it was the legislative intent to deprive *Mrs. Boncher* of compensation, the legislature most signally failed to express that intent, and it would be judicial usurpation for us to supply it by construction. The equities of this case occasion no regret for the conclusion which we feel imperative, and if the legislative intent is otherwise than here determined, there is ample opportunity for an early amendment of this statute.

It follows that the facts pleaded before the *Industrial Commission* by the plaintiffs here as a defense to the application for compensation constituted no defense thereto. Such facts constituting no defense, the *Industrial Commission* was not required to make findings with reference thereto, and its failure so to do, which plaintiffs assign as error, is wholly immaterial. It mattered not whether those facts were true or false, and the *Industrial Commission* properly disregarded them in arriving at its conclusions and award.

By the Court.—Judgment affirmed.

FINK, Plaintiff in error, vs. THE STATE, Defendant in error.

December 17, 1920—January 11, 1921.

Adultery: Evidence: Sufficiency: Letter received by woman from person other than defendant: Collateral matters: Use of assumed name by defendant: Criminal law: Instructions: Appeal.

1. In a prosecution for adultery, the evidence is *held* sufficient to support a conviction, although there was no direct corroborative evidence of intercourse, where there was corroboration of the opportunity therefor and of the parties being together at the times claimed.
2. Where there was evidence which, if believed, would support a conviction, and the trial court sustained the finding of the jury, this court cannot say that the jury erred in believing the evidence, and a conviction will not be set aside.
3. The exclusion of an obscene letter received by prosecutrix from a young man stating his desire to have intercourse with her, which at most merely raised a suspicion that her testimony that she first had intercourse with defendant was false, was within the discretion of the trial court.
4. Where prosecutrix testified that defendant told her she could write to him under another name, the reception of the postmaster's testimony that defendant received mail under such name was not prejudicial, though it related to a collateral issue, the parties being allowed to go into the matter as fully as they desired.
5. Though the evidence as to the offense was principally direct, the giving of an instruction which was correct as to the law where the evidence was wholly circumstantial was not prejudicial to the defendant, the charge as a whole being as favorable to him as the facts warranted, and the instruction also correctly stating the rule applicable where there is direct evidence of the offense.

ERROR to review a judgment of the circuit court for Pierce county: JAMES O'NEILL, Judge. *Affirmed.*

John E. Foley of Ellsworth, for the plaintiff in error.

For the defendant in error there was a brief by *W. G. Haddow*, district attorney, and the *Attorney General* and *J. E. Messerschmidt*, assistant attorney general, and oral argument by *Mr. Messerschmidt.*

VINJE, J. Defendant, a married man aged thirty-four years, was convicted of the crime of adultery with an unmarried woman, Clara Hansen, aged about sixteen, who worked for him demonstrating pianos. She testifies to a number of acts of sexual intercourse with him, fixing the time and place, one at a club house on their return from a trip out into the country, one at the office, and one at defendant's home when his wife was away, and to quite a number more at his house without being able to fix the time. It is true there is no direct corroborative evidence of actual intercourse between them, but there is corroboration of the opportunity therefor and of their having been at the office and house at the time claimed. We are strongly urged to set aside the conviction because of failure of adequate proof of guilt. A careful reading of the record convinces us that the evidence of the state, if believed, is sufficient to sustain the conviction. The jury believed it, and we cannot say upon the record that they erred in so doing, especially since their finding was sustained by the trial court. To set out the evidence sustaining the conviction would only incumber the Reports with matter that is better left unpublished.

A number of procedural errors claimed to be prejudicial are also urged as ground for reversal. Some of these will be noticed.

Clara testified that the first time she had sexual intercourse with a man was with defendant July 30, 1919. To dispute such statement the defendant offered in evidence a letter received by her previous to that time from a young man in which he expresses, among other things, a desire to have sexual intercourse with her. The whole letter is an obscene one. The court refused to receive it in evidence and this is alleged to be prejudicial error. It clearly appeared in evidence that Clara was a wayward girl who evinced a desire to lead a fast life. Considerable evidence to show such fact was received by the trial court. There is nothing in the letter offered to show that improper relations had been indulged in between Clara and the writer

previous to the writing of the letter or subsequent thereto, though it appeared in evidence that Clara had replied to the letter. Clara was not directly responsible for the contents of the letter. Of course her conduct may have invited it, but of her attitude on that subject there was ample proof. If she had sexual intercourse with the defendant, the fact that she previously had it with others would not excuse his offense, though, as urged by his counsel, it would not charge him with her first lapse from virtue. Since the offered letter would at most only raise a suspicion or guess that her statement that her first act of intercourse was with defendant was not true, we think the trial court properly refused to receive it. At best it was a collateral issue not determinative of the ultimate fact in issue, and it was within the discretion of the trial court to refuse to pursue that line of inquiry further.

Clara testified that defendant told her the night in the office when she informed him that she was going to leave home that she could write him addressing letters to L. H. Akron. He denied having so told her. To corroborate Clara and dispute defendant the state called Sanderson, the postmaster, who testified that the defendant received mail under the name of L. H. Akron. The reception of the postmaster's testimony is claimed to be prejudicial error. The evidence related to a collateral issue, but no prejudice resulted from its reception. Both parties were allowed and did go into it as fully as they desired.

A number of exceptions are taken to the judge's charge to the jury, but none of them are deemed well taken. The charge of the judge taken as a whole was as favorable to the defendant as the facts warranted. True, it contained some expressions as to what the law was in cases where the evidence was wholly circumstantial, but it also correctly stated the law of the case at bar where there was direct evidence of the offense. It would be better practice to limit instructions to the law applicable to the facts in the case, but

we are confident the jury was not misled by the superfluous charge as to the probative force of circumstantial evidence alone.

By the Court.—Judgment affirmed.

PORTER, Respondent, vs. INDUSTRIAL COMMISSION and another, Appellants.

WISCONSIN STATE REGISTER COMPANY, Respondent, vs. SAME, Appellants.

December 17, 1920—February 8, 1921.

Workmen's compensation: Findings of industrial commission: Inferential facts found: Weight on review: Jurisdiction of industrial commission: Award obtained by fraud.

1. A finding by the industrial commission that plaintiff was not an "employee" within the contemplation of the workmen's compensation act (sec. 2394—7, Stats.) is a finding of fact and cannot be disturbed by the court where the evidentiary facts, though not conflicting, permitted different inferences, the term "fact" including the inferences or inferential facts drawn by the trier from ascertained facts.
2. The rights established by the compensation act cannot be enlarged, restricted, or modified in respect to claims and liabilities within their scope.
3. The jurisdiction of the industrial commission is limited by the compensation act (sec. 2394—15) to the determination of disputes concerning compensation, and, on finding that a claimant was not an employee of the insured employer, the commission has no jurisdiction to adjudicate questions between the employer and the insurer as to their contract rights.
4. In actions by an applicant under the compensation act and by the insured employer against the insurer to review the order of the industrial commission denying compensation, based on a finding that claimant was not an employee, allegations that the insurer led plaintiffs to believe that the contract of insurance recognized claimant as an employee, and that the employer in good faith acted on such representation and accepted the policy on the ground that it included the claimant as an employee, do not show a right to relief on the ground that the award was obtained by fraud.

APPEALS from judgments of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Reversed.*

These actions, which are presented together, arose from the application of the defendant, *A. A. Porter,* for an award of compensation. In one case *A. A. Porter* is plaintiff, in the other the *Wisconsin State Register Company* is plaintiff.

A. A. Porter, president and chief stockholder of the *Wisconsin State Register Company,* suffered a severe injury to one of his eyes while waiting on a customer in the stock room of the *Wisconsin State Register Company.* He made claim for compensation before the *Industrial Commission,* and the *Travelers Insurance Company* contested his claim. The *Industrial Commission* filed an award finding certain facts and concluded he was not an "employee." For this reason the *Commission* denied him compensation under the workmen's compensation act.

Porter and the *Register Company* thereupon each brought a separate action in the circuit court for Dane county for a review of the *Commission's* order denying compensation. The *Register Company* also claims damages under the terms of the insurance policy.

The trial court decided that the undisputed evidence disclosed that *Porter* was an employee of the *Register Company* within the meaning and terms of the workmen's compensation act at the time he was injured, and remanded the case to the *Commission* for further proceedings. From this decision the *Industrial Commission* and the *Insurance Company* appeal to this court.

The complaint in the *Register Company's* action is the same as that in the *Porter Case,* except that it alleges that for many months following the alleged injury *Porter* was wholly incapacitated from working and during that time the *Register Company* paid to him his wages in an amount equal to or in excess of the compensation provided by the workmen's compensation act. The company asks that it be reimbursed to the amount paid by it to *Porter* during the

time he was incapacitated, and alleges that it is entitled to an award therefor against the defendant *Insurance Company*.

For the appellant *Industrial Commission* there were briefs by the *Attorney General* and *Winfield W. Gilman*, assistant attorney general, and oral argument by *Mr. Gilman*.

For the appellant *Travelers Insurance Company* there were briefs by *Olin, Butler, Stebbins & Stroud* of Madison, and oral argument by *Byron H. Stebbins*.

For the respondents *Porter* and *Wisconsin State Register Company* there were briefs by *Stroud & Stroud* of Portage, attorneys for *A. A. Porter*, and by *E. S. Baker* of Portage, attorney for *Wisconsin State Register Company*, and the cause was argued orally by *W. S. Stroud* and *P. C. Stroud*.

SIEBECKER, C. J. The fundamental issue in these actions presents the inquiry, Did the *Industrial Commission* correctly find that the plaintiff, *Porter*, at the time he sustained the injury to his eye in November, 1916, was not an employee of the *Wisconsin State Register Company* within the contemplation of the workmen's compensation act? The trial court held that the undisputed facts permit of but one inference, namely, that he was an employee of the company when he suffered the injury to his eye. Sec. 2394—7, Stats., defines the term "employee" as used in the workmen's compensation act: "(4) Every person in the service of another under any contract of hire, express or implied, oral or written." This act also provides (sub. 1, sec. 2394—19) that: "The findings of fact made by the commission acting within its powers shall, in the absence of fraud, be conclusive," and that the order or award of the *Commission* may be reviewed by action in court in the manner prescribed in the act. Among the grounds upon which the order or award may be set aside are: "(1) That the commission acted without or in excess of its powers; . . ." "(3) That the findings of fact by the commission do not support the order

or award." In the case of *Northwestern Iron Co. v. Industrial Comm.* 154 Wis. 97, 142 N. W. 271, it is declared that the *Commission's* ". . . 'findings of fact,' as recognized by the decisions of this court, mean findings of ultimate rather than evidentiary facts. . . . It is only when the facts are undisputed and no conflicting inferences respecting the ultimate facts can be drawn therefrom that the question becomes one of law" (citing). In *Milwaukee Western F. Co. v. Industrial Comm.* 159 Wis. 635, 150 N. W. 998, the court said:

"In the field of inferences from evidentiary facts their action is final and controlling under the authority conferred upon them by law, unless it appears that there is no reasonable basis for their conclusions under the facts and circumstances before them and thus rendering their action without or in excess of their powers."

In passing judgment on the *Commission's* award to ascertain whether or not it is supported by the evidence before them, it must be borne in mind that there are two kinds of facts—evidentiary facts and inferential facts. The word "fact" as employed in the legal sense includes "those conclusions reached by the trier from sifting testimony, weighing evidence, and passing on the credit of the witnesses, and it does not denote those inferences drawn by the trial court from the facts ascertained and settled by it." 3 Words & Phrases, 2638; *Ripon H. Co. v. Haas,* 163 Wis. 592, 158 N. W. 330. It is well established that if there is any evidence to support findings this court cannot disturb the *Commission's* order. True, as the trial court declared, the evidentiary facts before the *Commission* are not conflicting, but it is clear that the question presented to the *Commission* was to ascertain whether or not *Mr. Porter* was an employee within the contemplation of the workmen's compensation act. The conclusion was to be ascertained from the evidence before it. An examination of the evidentiary facts adduced before the *Commission* clearly permitted of the different inferences:

Was he or was he not an employee of the *Register Company?* Under this state of the evidence their determination of that fact cannot be disturbed by the courts and must stand as the final conclusion in this case. This result in itself is decisive of this case. We have, however, examined the evidence of the record and it satisfies us that the *Commission* as trier of fact arrived at the correct conclusion in finding as a fact that the evidence shows that *Porter* was not an employee of the *Register Company* when he received the injury to his eye, and hence his injury was not a compensable one under the provisions of the workmen's compensation act. The rights of the parties established by the provisions of the compensation laws cannot be enlarged, restricted, or modified in respect to claims and liabilities within their scope. Whatever they did in attempting to provide insurance for the liabilities arising under the compensation act may effectively aid in determining the nature of the insurance contract, but such contract cannot create any right or destroy a liability governed by the act. The claim made that the insurance company estopped itself by its conduct to assert a denial of liability under its policy has no relevancy to the inquiry whether or not *Porter* was an employee of the *Register Company* at the time in question under the compensation act. Under these circumstances the *Commission* has no jurisdiction to adjudicate questions between the *Register Company* and the *Insurance Company* as to their respective contract rights or liabilities aside from requiring payment of the compensation by the insurer in case an award for compensation is made. The question of estoppel and any rights predicated thereon drop out of the case as a necessary result of the finding of fact that *Porter's* injury is not a compensable one. This follows from the fact that the *Industrial Commission* is an administrative body and can only dispose of questions respecting disputes and controversies concerning compensation. Sec. 2394—15, Stats.; *Noer v. G. W. Jones L. Co.* 170 Wis. 419, 175 N. W. 784.

The allegations that the award was procured by fraud do not present this issue. The allegations on this subject are, in substance, that the *Insurance Company* led plaintiff to believe that the contract of insurance recognized him as an employee of the *Register Company* and that the *Register Company* in good faith acted on such representation and accepted the policy on the ground that it included and insured him as an employee.

We do not perceive how this in any sense constitutes a fraud in procuring the order of the *Commission* denying compensation. It is manifest that the allegations of fraud are barren of any facts showing that the *Commission's* order was based on or procured by fraud. It is considered that the allegations of fraud are wholly insufficient and do not constitute a cause of action for relief on this ground. It must be held that the circuit court erred in reversing the award of the *Industrial Commission.* The action of the *Wisconsin State Register Company* against the *Commission* and the *Insurance Company,* in the light of the fact that *Porter's* injury is not compensable, is also without merit and must be dismissed.

By the Court.—The judgment in the action of *Porter v. Industrial Commission* and the *Insurance Company* is reversed, and the cause remanded with direction to award judgment affirming the order of the *Industrial Commission;* and the judgment in the action of the *Wisconsin State Register Company v. Industrial Commission* and the *Insurance Company* is reversed, with direction to enter judgment dismissing the complaint.

BECKER, Appellant, vs. KREUL, Respondent.

January 11—February 8, 1921.

Statute of frauds: Agreement to repurchase corporate stock.

An oral agreement by a stockholder in a corporation to repurchase stock sold and delivered by another stockholder was within the statute of frauds and void (sec. 2307, Stats.), although such agreement was a part of the inducement extended to the purchaser. *Korrer v. Madden,* 152 Wis. 646, followed.

APPEAL from a judgment of the circuit court for Milwaukee county: W. B. QUINLAN, Judge. *Affirmed.*

Action to recover moneys agreed to be repaid upon the sale or transfer of certain corporate stock. In December, 1915, the defendant and Henry F. Cochems were equal owners of the capital stock of the Senator Lead & Zinc Company, a Wisconsin corporation. The authorized capital was $30,000, which had been issued, or was to be issued, to the defendant and Cochems in consideration of the transfer to the company of certain mining property situated in Southwestern Wisconsin.

It is the contention of the plaintiff that, in order to secure the sale of stock of the par value of $2,500 owned by Cochems, for the benefit of the corporate treasury, the defendant represented that he "would guarantee the plaintiff against any loss from said investment and would redeem said investment by returning the money to said plaintiff whenever said moneys would be demanded by the plaintiff and in any event before the expiration of one year." It is the claim of the plaintiff that, relying upon said representation and guaranty, he placed a mortgage upon certain property, borrowed $1,500 of his brother, paid the $1,500 into the treasury of the corporation for operating purposes, and received from Cochems $2,500, par value, of the capital stock of the company.

It is the claim of the defendant that he made no such

representation or guaranty; that the investment was made by the plaintiff voluntarily and in order to share the profits of what promised to be a profitable enterprise.

After the payment of the money on December 24, 1915, and on the 27th day of December, 1915, it appears, without dispute, that the plaintiff signed a certain contract or release as follows:

"This agreement, made this 27th day of December, 1915, by and between *William C. Kreul,* hereafter known as party of the first part, and *J. C. Becker,* hereafter known as party of the second part.

"For one dollar and other valuable considerations, the party of the first part is to have four hundred shares of stock in the Senator Lead & Zinc Company when organized, which certificate is to be turned over to the party of the first part by the party of the second part, fully paid for.

"It is further agreed that there shall be no liability whatsoever from party of the first part to party of the second part in connection with any agreements or arrangements in the organizing of the Senator Lead & Zinc Company, and they are hereby canceled, and any verbal arrangements are hereby canceled.

"In witness whereof the party of the first part and party of the second part have hereunto set their hands and seals this 27th day of December, 1915.

2d "J. C. BECKER. (Seal.)
1st "WM. C. KREUL. (Seal.)"

Defendant claims if any representation or guaranty was made by him, that by the execution of the agreement of December 27, 1915, known as Exhibit 2, he was thereby released.

In the complaint the plaintiff alleges that he signed such release "at the office of the said defendant, said defendant during the busy hours while plaintiff was under stress of the service in the business of said defendant, said defendant asked plaintiff to sign a memoranda which he said pertained to certain four shares of stock and to the operation of said mining company, which plaintiff without knowing the con-

tents thereof, in reliance upon the truthfulness of said statement, signed."

It is the claim of the defendant that the release was executed in response to a proposal made by the plaintiff, that the blanks therein were filled in by the plaintiff, the instrument read over by him and voluntarily signed with full knowledge of its contents.

The plaintiff asked for no equitable relief and the prayer was for the recovery of $1,500 damages, costs, and disbursements.

The issues were submitted to the jury, which found a special verdict as follows:

"(1) Was it agreed by and between the plaintiff and the defendant that in consideration of the purchase of the twenty-five shares of stock, that if plaintiff became dissatisfied within a year the defendant would take the stock back and return his money? *A.* Yes.

"(2) If you answer question number 1 'Yes,' then answer this question: Was it understood and agreed by the plaintiff and the defendant that the defendant was to be released from his obligations to refund to plaintiff his money in the execution of the instrument dated December 27, 1915? *A.* No.

"(3) Did the defendant intentionally misrepresent to the plaintiff, at the time he obtained his signature thereto, the character and contents of Exhibits 2 and 4? *A.* Yes.

"(4) If you answer question number 3 'Yes,' then answer this question: Was the plaintiff induced to execute said Exhibit marked 2 and 4 by reason of and in reliance upon said misrepresentations as claimed? *A.* Yes.

"(5) If you answer question number 4 'Yes,' then answer this question: Was the plaintiff, in the exercise of due care, justified in relying thereon? *A.* No."

Upon the coming in of the verdict there were motions for judgment by the plaintiff and defendant and full argument before the court, at the close of which the court directed that judgment be entered upon the verdict in favor of the defendant and denied the plaintiff's motions. Judg-

ment was thereupon entered dismissing the plaintiff's complaint with costs, from which the plaintiff appeals.

For the appellant there were briefs by *Cochems, Wolfe & Kolinski* and *Timlin & Dean,* all of Milwaukee, and oral argument by *H. F. Cochems* and *W. H. Timlin.*

For the respondent there was a brief by *Joseph B. Doe,* attorney, and *Churchill, Bennett & Churchill,* of counsel, all of Milwaukee; and the cause was argued orally by *W. H. Churchill.*

ROSENBERRY, J. This is an action to recover damages for breach of contract arising by reason of the refusal of the defendant to repurchase the stock in accordance with the agreement made December 24, 1917. It is not claimed that there was any fraud committed at the time of the making of this contract. If there was not in fact a valid contract, the question of whether or not the release of December 27, 1915, was procured by fraud becomes immaterial. This was a sale of stock owned by Cochems to the plaintiff, *Becker,* a part of the inducement being that the defendant agreed that he would, as found by the jury, take the stock and return the money if the plaintiff became dissatisfied within a year. These facts bring this case squarely within *Korrer v. Madden,* 152 Wis. 646, 140 N. W. 325. Here, as there, the defendant did not sell his own stock, no part of the purchase price was received by him, the stock was delivered to the plaintiff by Cochems, and payment was made to the company. We need not repeat here the discussion found in *Korrer v. Madden,* and we must hold that the contract in this case was within the statute of frauds. It was not in writing and therefore void. Sec. 2307, Stats.

By the Court.—Judgment affirmed.

TOY, Respondent, vs. OLINGER, Appellant.

January 11—February 8, 1921.

Landlord and tenant: Constructive eviction: Disturbance created by other tenants: Noxious odors: Continued occupancy.

1. The lessee of a portion of a building for a motion-picture theater could not defeat the payment of rent during the period of his occupancy or recover damages because another tenant in the building in the restaurant business furnished his patrons with music out of harmony with the music played in the theater, where there is not a sufficient showing of responsibility on the part of plaintiff for the situation complained of.
2. The fact that the odor of onions escaped from the basement of the building into the theater was not a constructive eviction of the tenant operating the theater, either partial or whole, where he continued to pay rent and remained in possession.

APPEAL from a judgment of the circuit court for Milwaukee county: E. T. FAIRCHILD, Circuit Judge. *Affirmed.*

Action to recover a balance due for rent on a certain portion of plaintiff's building in Milwaukee occupied by defendant for a moving-picture theater. The written lease provided for a term commencing January 1, 1917, terminating December 31, 1919, and at an annual rental of $4,000 for two years and then $5,000. Rent was duly paid until August 1, 1917. February 18, 1918, the usual form of notice to pay the rent then due or vacate was served. Pursuant to such notice the premises were vacated by defendant March 1st. This action was then brought for the rent due up to March 1st.

Defendant counterclaimed for damages, alleging a breach of the covenant for the quiet use and enjoyment of the premises, in that they were rendered untenantable for moving-picture purposes by reason of noxious odors arising from the basement of the building, and further from noise and disturbance permitted to be carried on in another portion of the building in premises adjoining defendant's by another tenant of plaintiff conducting a café in which there was

music furnished to his patrons, all of these things being to the great annoyance and disturbance of defendant's patrons. Defendant maintained that such situations continued by plaintiff or permitted by him were sufficient in fact and in law to amount to his constructive eviction either total or partial, thereby relieving him from the obligation to pay rent during such period and further entitling him to damages from the resulting financial harm.

The plaintiff conducted a restaurant in another portion of the same building. In connection therewith he had in the basement of the building, for a long time prior to the making of the lease with defendant and thereafter, stored and cut up onions. Within two weeks after taking possession defendant discovered that the odor from the onions permeated his premises, and from then on he complained of such condition at times to the plaintiff and attempted himself to remedy the same by changes in ventilation and other methods. In March he rented the theater to other tenants. These tenants occupied it for seven or eight weeks and then vacated. He then opened the theater himself for a period of three to four weeks and then closed it, opening again at the end of October for one week. It then remained closed until March 1st, when he vacated.

Some time in the spring of 1917 another portion of plaintiff's building was leased to a third person for café purposes. Immediately after taking possession this tenant commenced and thereafter continued to furnish music to his patrons. Defendant complained to plaintiff that this music interfered with the renting of the theater and drove away patronage.

By letter of September 17, 1917, the plaintiff notified defendant he would not give up the use of his basement for the purposes above indicated. On November 5, 1917, by letter, plaintiff notified defendant that the rent then unpaid was over $1,300 and such default was considered a violation of the lease. Thereafter defendant paid $100 in December and the same amount in January, 1918. Defendant testified

that his net loss in this particular enterprise was between seven and eight thousand dollars.

At the conclusion of the trial before a jury the court granted plaintiff's motion for judgment for the amount of the unpaid rent and dismissed defendant's counterclaim and directed judgment in accordance therewith. From such judgment defendant has appealed.

For the appellant the cause was submitted on the brief of *Cochems, Wolfe & Kolinski* of Milwaukee.

For the respondent there was a brief by *Stover & Stover* of Milwaukee, and oral argument by *Daniel G. Stover.*

ESCHWEILER, J. So far as the defendant's claim to defeat the payment of rent during the period of his occupancy of the premises or as a basis for damages is predicated upon the fact that another tenant of plaintiff furnished to his patrons a certain class of music which at times was quite out of harmony with the music being played in defendant's theater, no sufficient showing of responsibility on the part of the plaintiff for such situation has been presented so as to make plaintiff in any wise liable.

The odor with which nature has so bountifully endowed the onion had been escaping from the basement into the theater premises prior to defendant's taking possession thereof, as could then have been discovered by him. He first discovered it in about two weeks after taking possession on January 1st. In spite of that condition, so early brought to his attention, he continued to pay rent on said premises according to the lease and at the specified rate until August 1st. During this period he leased to others the same premises at a greater rental rate than that which he was paying, and after such subtenants gave up their lease, finding it an unprofitable venture, he used the theater himself. After he had stopped paying the rent in August he again opened the theater in October for a week and then remained in possession thereof until the notice to vacate was served on him.

On November 5th he was notified that his failure to pay rent was being considered a violation of the lease. He nevertheless elected to remain there, and did pay, after such notice, two instalments on the rent in December and January of $100 each.

Under the facts and circumstances the trial court was correct in holding that there was no constructive eviction, either partial or whole, by the landlord of the defendant as tenant. His remaining in possession; his unqualified payment of rent up to the 1st of August, 1917, must be considered to have been a waiver of any rights he then might have had to treat this condition, if chargeable to plaintiff, as a breach of the covenant of the lease.

Neither is there satisfactory proof that the substantial failure of defendant's business venture was the result of these odors escaping into his theater premises.

It follows that the trial court was right in dismissing defendant's counterclaim and directing judgment for the amount of the unpaid rent.

By the Court.—Judgment affirmed.

BOSANICH, Appellant, vs. CHICAGO, NORTH SHORE & MILWAUKEE RAILROAD COMPANY, Respondent.

January 11—February 8, 1921.

Master and servant: Personal injury: Corporations constituting one legal entity: Evidence: Sufficiency.

In an action by an employee for damages for personal injuries against one of two corporations on the theory that they constituted one legal entity, both being engaged in carrying on distinct businesses, each owning its own property, each receiving and disbursing its own revenues, and each engaging its own employees, *held,* under all the evidence, there was no ground shown upon which the plaintiff could be treated as an employee of the defendant.

APPEAL from a judgment of the circuit court for Milwaukee county: BYRON B. PARK, Judge. *Affirmed.*

This action was brought by the plaintiff against the defendant to recover damages for personal injuries sustained by him while engaged as a track repairer by the Chicago & Milwaukee Electric Railway Company in the city of Milwaukee. From a judgment in favor of the defendant the plaintiff appealed.

For the appellant there was a brief by *Ray J. Cannon* and *A. W. Richter,* both of Milwaukee, and oral argument by *Mr. Richter.*

For the respondent there was a brief by *Edgar L. Wood* of Milwaukee, attorney, and *Addison L. Gardner* of Chicago, of counsel; and the cause was argued orally by *Mr. Wood.*

OWEN, J. This action was brought against the *Chicago, North Shore & Milwaukee Railroad Company* to recover damages for personal injuries, under the provisions of the federal employers' liability act (35 U. S. Stats. at Large, 65, ch. 149). The plaintiff was in the employ of the Chicago & Milwaukee Electric Railway Company as a track repairer and seeks to hold the defendant in this action on the ground that it and the Chicago & Milwaukee Electric Railway Company constitute one legal entity, and that the employees of the one are in fact the employees of the other.

It appears that the Chicago & Milwaukee Electric Railway Company was organized as a Wisconsin corporation in 1896, at about which time it obtained a franchise from the city of Milwaukee for the operation of street cars over certain streets therein. In 1908 its franchise was amended so as to permit it, its successors or assigns, to run interurban cars over its tracks. The defendant company is an Illinois corporation, and operates an interurban electric railroad from Chicago to Milwaukee and was organized in the year

1916. In the city of Milwaukee it operates its trains over the tracks of the Chicago & Milwaukee Electric Railway Company by arrangement with the latter company and pursuant to the authority granted by the ordinance of 1908, above mentioned. Each company has capital stock outstanding to the amount of $100,000. It is held by the same trustees, who have issued participating certificates against the stock of the *Railroad Company*. The entire capital stock of the Railway Company is pledged as additional security under the first mortgage of the *Chicago, North Shore & Milwaukee Railroad Company*. Both companies use the same offices and have substantially the same officers. However, the funds of each company are kept separate and intact. Each company collects its own revenues, deposits them to its separate account, and pays them out for its individual purposes. At no time is there a mingling of the moneys of the two companies. The tracks within the city of Milwaukee are owned by the Electric Railway Company, whose business is confined to that of a street railway business within the city of Milwaukee. It employs the men who repair the tracks therein and pays them out of its own funds. The plaintiff in this action was employed by the Electric Railway Company and was paid out of the funds of that company.

The jury found that plaintiff was an employee of the defendant, but this finding was set aside by the trial court, who, upon the record, determined that plaintiff was not an employee of the defendant. We think the trial court took the correct view, and that although there is a close operating agreement between the two companies, and perhaps at the present time an identity of the ownership of the stock of the two companies, they nevertheless constitute two legal entities, each having individual ownership of its respective property and each collecting and managing the revenues arising from their respective businesses.

No case has been cited to our attention which goes to the

extent of holding that under the circumstances here disclosed the plaintiff may be considered as the employee of the defendant. The case of *Wichita Falls & N. W. R. Co. v. Puckett,* 53 Okla. 463, 157 Pac. 112, strongly relied upon by the appellant, is clearly distinguishable. In that case two railway companies, incorporated under the laws of different states, whose tracks connected at the state line, operated a continuous line of railway thus formed as a unit, and treated earnings thereof as a common fund from which the employees and expenses of operation of the line were paid, although the earnings and expenses were arbitrarily credited and charged to each company in proportion to the mileage owned by it. In that case there was clearly a joint operation, and the entire line of both companies was considered as a single business. The employee of one company was also the employee of the other.

Nor is this situation comparable to a case where the owner manages his property through a corporate agency. Under such circumstances this court has refused to recognize the fiction of separate corporate existence and has treated the act of the owner as the act of the corporation, or *vice versa,* as in *Milbrath v. State,* 138 Wis. 354, 120 N. W. 252; *Haynes v. Kenosha E. R. Co.* 139 Wis. 227, 119 N. W. 568, 121 N. W. 124; *Wolf Co. v. Kutch,* 147 Wis. 209, 132 N. W. 981; *Dibbert v. Metropolitan Inv. Co.* 158 Wis. 69, 147 N. W. 3; *Ferneckes v. Nugent Sanitarium,* 158 Wis. 671, 149 N. W. 393. Here we plainly perceive two corporate legal entities engaged in the carrying on of distinct businesses, each owning its own property, each receiving and disbursing its own revenues, and each engaging its own employees. We see no ground upon which the plaintiff can be treated as an employee of the defendant, consequently the judgment must be affirmed.

By the Court.—Judgment affirmed.

PADDEN, Appellant, vs. CITY OF MILWAUKEE, Respondent.

January 11—February 8, 1921.

Municipal corporations: Highways: Insufficiency: Test of liability: Slight obstruction in sidewalk.

1. The projection of a pipe one and five-eighths inches high and two and three-quarters inches wide near the edge of a sidewalk in a city highway and out of the main line of travel is not an actionable defect under sec. 1339, Stats., making the city liable to one injured by reason of the insufficiency or want of repair of the highway.
2. In ascertaining whether a city is liable under said sec. 1339 for injuries caused by the defect complained of, the test is not the negligence of the city, but whether the highway is insufficient within the meaning of the statute.

APPEAL from an order of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Affirmed.*

Action for personal injuries. A demurrer to the complaint was sustained by the trial court. From the order so doing plaintiff appeals.

For the appellant there was a brief by *Cannon, Waldron & Nebel,* attorneys, and *A. W. Richter,* of counsel, all of Milwaukee; and the cause was argued orally by *Mr. Richter.*

For the respondent there was a brief by *Clifton Williams,* city attorney, and *John M. Niven,* first assistant city attorney, and oral argument by *Mr. Niven.*

JONES, J. The portion of the complaint which alleges the insufficiency of the walk in question is as follows:

"Said plaintiff further shows to the court, upon information and belief, that for some time prior to said 25th day of November, A. D. 1917, said defendant city had maintained what was commonly known as and called a water bubbler, at a point twelve (12) feet three and one-half (3½) inches west of the lot line of Eleventh avenue and north of said curb line on National avenue, one (1) foot four (4) inches. That some time prior to said 25th day of November, A. D. 1917, said bubbler had been removed and that the pipe to

which said bubbler had been connected at said point, twelve (12) feet three and one-half (3½) inches west of said lot line and one (1) foot four (4) inches north of said curb line on National avenue, had negligently been permitted by said defendant city to extend and project above said cement sidewalk one and five-eighths (1⅝) inches. That the cap, or covering, of said pipe was two and three-fourths (2¾) inches. That otherwise said cement walk was smooth and unobstructed. That said projection of one and five-eighths (1⅝) inches was in nowise protected and constituted a dangerous defect in said cement walk, all of which was well known to the officers and agents of said defendant city."

There is also this allegation:

"That located upon the curb of the south line of said cement walk on said National avenue, in a direct north-and-south line with the westerly lot line of said Eleventh avenue, was a United States mail box."

The complaint was so framed as to present the question of liability as a matter of law, and by stipulation it was agreed that two photographs of the premises might be used as though made a part of the complaint. These photographs show that the projection complained of is near the outer edge of the walk, in line with the mail box mentioned in the complaint and outside the most traveled part of the walk.

The question here presented is whether a projection one and five-eighths inches high and two and three-fourths inches wide near the edge of a walk in a city street, and out of the main line of travel, is such a defect as to be actionable under sec. 1339, Stats. Counsel for the appellant recognize the full force of the decisions of this court in cases where projections a little higher than the one in question have been held not to constitute defects, but seek to distinguish these cases by urging in the first place that in this case the projection is so small in area as not to be easily visible, and therefore is more dangerous. We do not find that the decisions have recognized any such distinction, and we are not inclined to rule that a projection in a walk two and

three-fourths inches in width is a defect while a similar one considerably wider is not. Actions where persons are injured by striking some slight obstruction in a walk generally arise from accidents occurring in the nighttime and when the traveler has not observed the alleged defect.

In the leading case on the subject in this state, *Kleiner v. Madison,* 104 Wis. 339, 80 N. W. 453, the accident was caused by tripping in the night on an apron made of planks and cleats extending across the walk and not exceeding two inches in height. In the case of *Kawiecka v. Superior,* 136 Wis. 613, 118 N. W. 192, the obstruction was planks extending across the walk and two inches high. According to our view, the chances of accident under such conditions are greater than in the situation presented in this case.

Counsel for appellant also attempt to distinguish this case from others by the claim that the obstruction was no part of the sidewalk, that it was not a repair, and was entirely useless. It is true that in the cases cited above the alleged defects were placed across the walk purposely to make the walks more safe for travel. Nevertheless, if in the judgment of the court it had been a jury question whether the walks were actually unsafe for travel within the meaning of the statute, it would not have been deemed a defense that the alleged defects were intended as repairs or placed there for some laudable purpose.

In this class of cases it is to be borne in mind that the test of liability is not the negligence of the municipality, but whether the highway is *insufficient* within the meaning of the statute. *Maxwell v. Wellington,* 138 Wis. 607, 120 N. W. 505. A rule that the negligence of officials should be the test would probably be quite as unfavorable to the traveler as to the municipality.

It follows that the fact that the projection was no necessary part of the walk or may have been improperly left there does not distinguish the cases cited in this opinion. In several comparatively recent cases the alleged defects were

more serious than in the present case. In the *Kawiecka Case* there was an abrupt drop of two inches going in one direction and an abrupt ascent of two inches going in the opposite direction, and the condition had existed from July to September, when the accident happened. In sustaining the demurrer Mr. Justice BARNES said:

"For many reasons that might be enumerated, it is well nigh impossible for municipalities to keep streets and sidewalks in perfect condition at all times. Slight inequalities will almost unavoidably be found in sidewalks in our cities over which there is a large volume of travel. Because of the serious problem that confronts municipalities in reference to keeping their highways in an efficient state of repair, the court in construing sec. 1339, Stats. 1898, has not required them to keep such highways in perfect condition, but only reasonably safe for travel. Under the decisions cited the trial court was right in holding that the sidewalk in question was reasonably safe for travel, and that the defect complained of was too trifling and inconsequential to create a basis for a right of action under said sec. 1339." 136 Wis. 613, 616, 118 N. W. 192.

In *Snyder v. Superior,* 146 Wis. 671, 132 N. W. 541, a plank sidewalk was joined at an alley by a crosswalk. At the outer edge of the sidewalk there was a drop of about four inches to the crosswalk, but the drop did not exceed two inches at any place in the main line of travel. It was claimed that the traveler was walking on the outer edge of the walk in the evening and was thrown to the ground. The trial judge set aside a verdict for the plaintiff. In affirming the judgment Mr. Chief Justice WINSLOW said:

"Foot passengers do not usually walk on the extreme outer edge of a sidewalk. The drop in the walk in question evidently does not exceed two inches at any place where a foot passenger would naturally be expected to walk. We think the court was right in holding as a matter of law that the walk was reasonably safe for travel, and that the defect complained of was too 'trifling and inconsequential' to create a basis for a cause of action." Page 672, citing the *Kawiecka Case.*

A still more recent case following the general line of decisions is *Van der Blomen v. Milwaukee,* 166 Wis. 168, 164 N. W. 844.

We hold that the trial judge did not err in sustaining the demurrer.

By the Court.—Order affirmed.

TULLGREN and others, Respondents, vs. KARGER and another, Appellants.

January 11—February 8, 1921.

Contracts: Action to recover architects' fees: Evidence: Judicial knowledge of value of services: Offer of judgment: Form: Offer as part of answer: Effect.

1. In an action to recover for architects' services, consisting of consultations, making of sketches, etc., a court cannot take judicial notice of their reasonable value, such value not being a subject of general knowledge.
2. Neither jurors nor trial courts in arriving at their conclusions of fact can properly act upon their special individual knowledge as to matters which are not of common knowledge; and in matters outside of the field of general knowledge and in cases where the testimony of experts and those particularly familiar with the matters at issue is necessary, the findings of all triers of fact, either court or jury, must be based upon testimony of witnesses or other evidence made a part of the record. The only exception to the rule is in cases where a trial court exercises his independent judgment as to the value of attorneys' services rendered in a case before him.
3. Where defendants in an action by architects to recover for services rendered admitted liability in the amount of $200, the plaintiffs basing their action on an express contract for $1,750, and the court rendered judgment for $600 for plaintiffs, for which there was no basis in the evidence, on appeal defendants were bound by their admission of liability for $200 and plaintiffs were entitled to judgment for that sum, even though they insisted on appeal that there was an express contract for the larger amount.
4. Although defendants in their answer offer "to allow judgment to be taken against them in this action for the sum of $200 with costs," such offer cannot be considered as an offer of

judgment under sec. 2789, Stats., or as having any effect upon plaintiffs' right to costs in the trial court, as the offer of judgment under such statute must be embodied in some other document than the answer itself.

5. If an offer of judgment under said sec. 2789 is not accepted within the ten-day period fixed by that section it must be withdrawn from all consideration of the court and cannot be used in evidence in any way, nor can it be subsequently accepted after the period limited; but when an offer of judgment is embodied in an answer it becomes a part of the pleading, is properly before the court, and may be offered in evidence and considered by the jury during the trial.

APPEAL from a judgment of the circuit court for Milwaukee county: HENRY GRAASS, Judge. *Reversed.*

The plaintiffs, copartners and architects, sued defendants to recover $1,750 alleged to be the reasonable value of their services between December 1, 1917, and February 1, 1918. The complaint alleged as to such services that they "consisted of consultations, forming and drafting sketches, completed plans and specifications, and receiving proposals for the erection and construction of a building for the defendants."

The answer, among other things, admitted "that the plaintiffs rendered architectural services consisting of consultation and forming and drafting sketches at the special instance and request of the defendants as copartners, which services were reasonably worth not to exceed $200. . . ." It further alleged that plaintiffs were requested to complete plans and specifications and receive proposals for the erection and construction of a building for defendants, and that such services were retained solely and only by way of preliminary sketches and advice, and no more. It also alleged that the plaintiffs were informed that under no circumstances would or could the defendants expend more than $50,000 in the erection of the proposed building, and that it was represented by plaintiffs to defendants that such could be erected at a cost of not to exceed $50,000, but shortly thereafter defendants were informed that such would cost

about $68,000, whereupon the defendants notified plaintiffs to cease all work in the premises.

This further allegation also appeared in the answer:

"4. The defendants admit that they have not paid the plaintiffs anything on account of services, and hereby offer to allow judgment to be taken against them in this action for the sum of $200 with costs."

The case was tried without a jury and the court found in substance:

First, that the plaintiffs rendered architectural services consisting of consultations, the forming and drafting of sketches, completed plans and specifications, and receiving of proposals for the erection and construction of defendants' building.

Second, that said services were reasonably worth the sum of $1,750.

Third, that the minds of the parties did not meet and form a contract as to all of said services.

Fourth, that the minds of the parties did meet and form a contract as to that part of said services which consists of consultations, the making of preliminary sketches and drawings, the securing of bids or proposals to procure an approximate or estimated cost of a concrete-constructed building.

Fifth, that the services rendered by plaintiffs under the last above finding were at defendants' instance and request and are reasonably worth the sum of $600.

Sixth, that the minds of the parties did not meet and form a contract as to the part of the services which consisted of a detailed plan and specifications and bids for the purpose of making binding contracts for the erection of a concrete-constructed building.

As conclusion of law, that the plaintiffs are entitled to judgment against the defendants for said sum of $600 with interest and costs.

The defendants appealed from the judgment entered in accordance therewith.

The plaintiffs gave notice, under sec. 3049*a*, Stats., that they would ask for a review and modification of the findings so far as the same prevented the entry of judgment in their favor for $1,750.

For the appellants there was a brief by *Schmitz, Wild & Gross* of Milwaukee, and oral argument by *Robert Wild.*

For the respondents there was a brief by *Churchill, Bennett & Churchill* of Milwaukee, and oral argument by *W. H. Churchill.*

ESCHWEILER, J. The plaintiffs contend, under their motion to review the judgment, that the finding by the trial court to the effect that the contract between the parties was for but a part and not for all of the services actually rendered by the plaintiffs was erroneous and should have been set aside as contrary to the weight of the evidence; that then a finding should be made that the services which were in fact rendered were all under the contract, and, the value being fixed at $1,750, that amount should be allowed as damages.

There is no dispute but that when defendants went to plaintiffs' office and arranged with them for their professional services the defendants had not then purchased or decided upon the purchase of any particular lot on which to erect a factory building. It is also without dispute that some sum was mentioned by defendants as being the maximum cost of any building which they could undertake to erect. It is also without dispute that sometime prior to the receiving by plaintiffs of sealed bids from contractors to do the work under the completed plans and specifications which they had finally prepared, the defendants had abandoned the idea of putting up a building of their own and had made arrangements for the leasing of one.

There is sharp dispute between the witnesses as to whether or not the defendants did, after the completion of the preliminary sketches and the stating by plaintiffs of the approxi-

mate cost of a building which could be completed either under mill or concrete construction according to the general outline and scope of such preliminary sketches, direct the plaintiffs to proceed to completion with the plans, sketches, and specifications upon which complete and final bids might be received. There is also no question but that a very substantial part of the services rendered and performed by the plaintiffs were rendered subsequent to such order, if any such were given. The trial court was of opinion, as is evident from his written opinion and findings, that the plaintiffs had not met the burden of proof required of them as to their theory of the contract.

An examination of the record does not convince us that the trial court was wrong in so deciding, and his conclusions, therefore, in that regard must be and are upheld.

In the disposition of this case, therefore, it must be assumed that the entire services rendered by the defendants and found to be of the reasonable value of $1,750 were not rendered under and pursuant to the contract between the parties, but consisted in large part of matters and services in excess of those for which plaintiffs contracted and agreed to pay.

The issue as to whether the services were of the wide extent claimed by the plaintiffs or of the more restricted nature claimed by defendants, was squarely presented by the pleadings and was present all through the trial. It was of course incumbent upon plaintiffs, if entitled to recover under either theory of the case, to present to the court competent evidence upon which a proper assessment of damages might be made. The plaintiffs evidently elected to stand squarely upon their view and position as to the contract between the parties, and upon that alone. Plaintiffs continue to so stand upon that view, both by their motions in the trial court after trial and their motion to review here, no request for a new trial being made. Their entire evidence, both that by the plaintiffs themselves and by the architects

called by them to also testify as experts as to the reasonable and customary charge for such services in the locality where they were rendered, all was to the effect that such charge was a rate of three and one-half per cent. upon the approximate cost of the proposed building. All the witnesses included as necessary and essential elements of such method of computation and rate the entire services as rendered by plaintiffs, and to the full extent thereof, rather than of or upon the limited services under such a contract as was found by the court.

The difficulty now presented, however, is that, while such method of computation would fit the situation covering the entire services, it affords no basis upon which a court or jury could properly arrive at an estimate as to the value of the services necessarily performed within the restricted field covered by the narrower contract as found by the court. There is no testimony as to the amount of time necessarily spent in the performance of the contract as so limited or any customary rate of compensation for such limited services. There is nothing from which it is possible to say that the amount done under that contract was any certain or definite proportion of the entire work done and services rendered.

The court being confronted with this dilemma and evidently considering that it became his duty to assess damages in some amount to the plaintiffs, it being conceded by the pleadings that they were entitled to some, then determined that in his judgment the value of such services was $600. No basis is suggested in the opinion of the trial court nor by respondents here by which the sum of $600 can be arrived at as such valuation rather than $500 or $700 or any other sum.

The value of such services as were here rendered by plaintiffs was not a subject of general knowledge or such as comes within the wide field wherein courts can take judicial notice of certain classes of facts. The very nature of plaintiffs' evidence as to the value of such services shows

that proper proof of the measure of compensation in such matters is peculiarly one requiring the evidence of those familiar as experts with such work and the customary pay therefor in the particular locality where rendered.

That the trial court had knowledge from personal experience as to the reasonable value of services such as were rendered by the plaintiffs under the contract does not appear in the record. Though a trial court has particular personal knowledge or experience in such line of work from which he would be qualified to form a judgment upon such a matter, even then such particular personal experience could not be used as a basis for making such a finding. Neither jurors nor trial courts in arriving at their conclusions of fact in any particular case can properly act upon their special individual knowledge as to matters which are not of common knowledge.

In matters outside of the field of general knowledge and in cases where the testimony of experts or those particularly familiar with the matters at issue is necessary, the findings of all triers of fact, either court or jury, must be based upon testimony of witnesses or other evidence made a part of the record. *Kuder v. Waukesha Co.* 172 Wis. 141, 178 N. W. 249; *Menn v. State,* 132 Wis. 61, 64, 112 N. W. 38; *Shafer v. Eau Claire,* 105 Wis. 239, 243, 81 N. W. 409; *Johnson v. Superior R. T. R. Co.* 91 Wis. 233, 237, 64 N. W. 753; *Sherman v. Menominee River L. Co.* 77 Wis. 14, 22, 45 N. W. 1079; Jones, Evidence (2d ed.) § 133.

In such a situation as here presented neither court nor jury has any more right to arrive at a conclusion of their own without testimony to support it than has a court or jury to disregard competent proper evidence as to the value of services where there is no contradiction thereof in the record. *Ladd v. Witte,* 116 Wis. 35, 40, 92 N. W. 365. It is only in cases where the value of attorneys' services is at issue that a trial court may exercise his own independent judgment as to the value of such services so far as they were rendered in

the case before him. There is good reason for such a rule and it has been often recognized. *Larscheid v. Kittell,* 142 Wis. 172, 177, 125 N. W. 442; 2 Ruling Case Law, 1060; 6 Corp. Jur. 764.

The defendants' answer, quoted in the above statement of facts, contained allegations which should and must be treated as an admission to the effect that the sum of $200 was due to plaintiffs for their services. Upon such admission the plaintiffs might have moved the court under sec. 2892, Stats., for an order requiring the immediate payment of the amount so admitted, and such order could be enforced under the express provisions of said section, as might be a judgment or provisional remedy.

Such admissions of liability as were made by the defendants in their answer herein are still binding upon them, and upon such admissions the plaintiffs were and are entitled to a judgment for the sum of $200, together with interest from the commencement of this action and their costs in the circuit court.

Although the defendants use language in their answer whereby they "offer to allow judgment to be taken against them in this action for the sum of $200 with costs," still such language, when used in such a formal pleading as an answer, cannot be considered as an offer of judgment under sec. 2789, Stats., or as having any effect upon plaintiffs' right to costs in the trial court or in any other regard.

Under said sec. 2789, Stats., the offer of judgment therein provided for must necessarily be embodied in some other document than the answer itself, for if such statutory offer of judgment is not accepted within the limited period it must be withdrawn from all consideration of the court until after trial, and cannot be used in evidence in any way (*Bourda v. Jones,* 110 Wis. 52, 59, 85 N. W. 671); nor can it be subsequently accepted after the period limited in the statute. *Smith v. Thewalt,* 126 Wis. 176, 105 N. W. 662.

But when, as here, such alleged offer of judgment is

embodied in the answer itself, it becomes a part of the pleadings and therefore of the record of the case and is properly before the court, and may be offered in evidence and considered by the jury during the trial. *Schoette v. Drake*, 139 Wis. 18, 22, 120 N. W. 393, and cases there cited; *Sims v. Mutual F. Ins. Co.* 101 Wis. 586, 589, 77 N. W. 908.

The language used in the case of *Landauer v. Kasik*, 155 Wis. 376, 144 N. W. 974, suggesting that a somewhat similar admission in the answer there before the court might be considered an offer of judgment as well as an admission, must be deemed qualified to the extent herein indicated.

By the Court.—Judgment reversed, and the cause remanded with directions to enter judgment for plaintiffs in accordance herewith.

DEMPSEY, Appellant, vs. NATIONAL SURETY COMPANY, Respondent.

January 12—February 8, 1921.

Appeal: Right to appeal: Conditions: Discretion of legislature: Review of rulings at request of respondent: Respondent as appealing party.

1. The right to an appeal to this court and the conditions upon which it may be taken are matters entirely within the discretion of the legislature.
2. Under sec. 3049*a*, Stats., giving to a respondent a right to a review of rulings of which he complains on giving due notice stating in what respect he asks for a review, reversal, or modification of the judgment or order appealed from, he is as to such part of the judgment or order an appellant, and under Rule 32 of this court is entitled in the discretion of this court, on his appearing and the original appellant not appearing, to have such part of the judgment or order reversed as of course upon the merits and without argument.

APPEAL from two orders of the circuit court for Milwaukee county: GUSTAVE G. GEHRZ, Circuit Judge. *Reversed on errors assigned by respondent.*

The plaintiff commenced an action in the civil court of Milwaukee county against the defendant J. H. Reisler, and also in the same court and at about the same time proceedings against the *National Surety Company* and another as garnishee defendants.

The garnishee proceedings were dismissed as to both garnishees on the plaintiff failing to appear. Thereafter an *ex parte* order was made by the civil court setting aside such order and judgment of dismissal. Judgment was subsequently ordered as against the garnishee defendants for the amount claimed in plaintiff's complaint on the ground that such garnishee defendants had failed to make proper showing before the said civil court upon its order requiring them to do so. The *National Surety Company,* one of such garnishee defendants, thereafter obtained a writ of *certiorari* from the circuit court for Milwaukee county to review such proceedings and also took an appeal to the same court from such orders or judgment.

The circuit court granted a motion there made by the garnishee defendant to have consolidated and heard as one matter the writ of *certiorari* and the appeal, both involving the same questions as to identical proceedings. It also reversed the orders and the judgment entered in said civil court as against the garnishee defendant but without prejudice to the right of the plaintiff to take further proceedings in the civil court as to the matters ruled upon in such orders and judgment. It further held in effect that the civil court of Milwaukee county had and has jurisdiction of the garnishee action, with power to entertain proceedings therein, and remanded the record to the civil court for further proceedings.

The plaintiff in October, 1919, gave notice of appeal to this court from such part of the judgment of the circuit court as reversed and vacated certain of the orders of the civil court and appealed also from the order of the circuit court consolidating the *certiorari* proceedings with the aforesaid appeal. Plaintiff gave a bond on such appeal as re-

quired by statute and served such notice of appeal and undertaking on the attorneys for the garnishee defendant on October 23, 1919. The return, however, on such appeal to this court was not made nor the record filed here until August 13, 1920. The appellant has neither served nor filed any printed case or brief on his appeal.

On April 6, 1920, the garnishee defendant, *National Surety Company*, served notice on plaintiff's attorneys that it would on its own behalf ask this court to review and modify the order and judgment of the circuit court so far as the same provided that the former orders of the civil court should be without prejudice to the right of the plaintiff to apply for or of the civil court to again vacate the judgment of dismissal of the garnishee proceedings as against it, and to so much of the ruling of the circuit court as determined that the civil court had and has jurisdiction of the cause so far as the same affects the garnishee defendant.

Upon this cause being reached in due order upon the calendar here in January, 1921, the appellant failing to appear, the garnishee defendant moved that so much of the orders of the circuit court as were made the subject of the garnishee defendant's motion to review here should be reversed because of appellant's default, as of course, and that the order and judgment of the circuit court be modified in accordance with such request.

Miller, Mack & Fairchild of Milwaukee, for the respondent.

No appearance for the appellant.

ESCHWEILER, J. The following are rules of this court:

"Rule 31. If neither side of a cause is submitted or presented when reached for argument, it will be dismissed or continued, in the discretion of the court.

"Rule 32. When a cause is submitted or presented by counsel for appellant or plaintiff in error, but not by the op-

posing party, the judgment or order appealed from may be reversed as of course, without argument.

"Rule 33. When a cause is submitted or presented by counsel for the respondent or defendant in error, but not by the opposing party, the judgment or order appealed from will be affirmed as of course, without argument."

Since the adoption of such rules, sec. 8, ch. 219, Laws 1915, which provided as to appeals to this court, created a new statute, sec. 3049*a*, the part material for consideration here reading as follows:

". . . In any case the respondent may have a review of the rulings of which he complains by serving upon the appellant any time before the case is set down for hearing in the supreme court a notice stating in what respect he asks for a review, reversal or modification of any part of the judgment or order appealed from."

Prior to the adoption of the above cited statute it was an appellant alone who presented by his notice of appeal the matters which were to be reviewed in this court. Under our rules as originally framed to meet such a situation, an appeal being regularly reached, the appellant appearing and the respondent in default, the appellant was entitled to have, under Rule 32, *supra*, the matter appealed from reversed as of course without argument and with the same effect as though heard, and all questions raised by appellant decided in his favor. Such was the procedure recognized in the following cases: *Butts v. Fenelon*, 38 Wis. 664; *Hughes v. Libby*, 42 Wis. 639; *Oma v. Wilkinson*, 129 Wis. 119, 108 N. W. 210.

If it was the appellant, however, who was in default, the respondent appearing and so requesting, the determination of the trial court was then affirmed as of course and without argument under Rule 33, *supra*. Although there appear to be no decisions in our Reports directly passing upon this particular rule, the practice thereunder has been uniform and as stated.

It is evident that the legislative purpose of that portion

of sec. 3049*a*, Stats., above quoted, is to place a respondent who seeks here to have reviewed other parts or portions of any order, judgment, or record brought here by his opponent's appeal in the same situation, so far as all questions of relief to be afforded him in this court are concerned, as though such respondent were an appellant himself by formal appeal as to such portions of the record in the court below thus sought to be reviewed. Under this statute the original appellant is, as to the matters sought to be reviewed by respondent, "an opposing party" within the plain intent of Rules 32 and 33, *supra*.

While it is apparent that under this section the respondent may obtain a review of the record as to matters of which he complains without any statutory requirement as to the furnishing of an undertaking or bond to secure the opposing party as to costs, yet that cannot properly be held to lessen his rights or minimize his position as against an opposing party. The right to an appeal and the conditions upon which it may be taken are matters entirely within the legislative discretion. *Filer & Stowell Co. v. C., M. & St. P. R. Co.* 161 Wis. 591, 594, 155 N. W. 118; *Harrigan v. Gilchrist*, 121 Wis. 127, 215, 99 N. W. 909, and cases there cited.

We therefore hold that where a party to a record in a court below is brought here by an appeal taken by his opponent, upon giving due notice under the above quoted section of his desire to have specified rulings of the lower court reviewed he is to be considered as an appellant so far as matters he seeks to have reviewed are concerned. Then when a situation arises such as we have before us, of the original appellant failing to appear, and the opposing party, the respondent here, appearing, then, under Rule 32, *supra*, such respondent is entitled, within the discretion of this court, to have, as against the opposing party, the original appellant, so much of the judgment or order so sought to be reviewed by respondent reversed as of course upon the merits and without argument. It is here so ordered.

By the Court.—The parts of the order of the circuit court sought to be reviewed by respondent under its notice of April 6, 1920, are reversed, and the cause remanded for further proceedings in accordance herewith.

PIETSCH, Respondent, vs. SANGOR and another, Appellants.

January 12—February 8, 1921.

Mechanics' liens: Waiver by taking note: Discharge of lien: Evidence.

1. Where a subcontractor, on the delivery to him of a note, agreed in writing to waive his subcontractor's lien upon payment of the note, the execution by him of a further release or waiver was not a condition precedent to the right of recovery on the note, since the agreement itself constituted a waiver of the lien, to become effective upon the payment of the note, and since the payment of the note would of itself extinguish the lien, making the formal execution of a waiver a superfluous formality.
2. In a subcontractor's action against a landowner, the evidence is *held* insufficient to warrant a finding that the amount received by the owner from the contractor's surety included an item for the amount due from the contractor to the subcontractor.

APPEAL from a judgment of the circuit court for Milwaukee county: WALTER SCHINZ, Circuit Judge. *Reversed.*

Sophie K. Sangor, in her lifetime, undertook the erection of an apartment building on premises owned by her in the city of Milwaukee. Her husband, *B. W. Sangor*, was her general agent in all matters relating to the enterprise. She contracted with Lex Brothers, general builders, for the construction of the building. Lex Brothers executed a bond to her, conditioned for the faithful performance of the contract, in the sum of $10,000, with the Royal Indemnity Company as surety. Lex Brothers sublet the iron work to the plaintiff, and shortly thereafter plaintiff served Sophie K. Sangor with a preliminary notice of intention to claim a

subcontractor's lien under and by virtue of the provisions of sub. 1, sec. 3315, Stats. 1915. Before the completion of the building Lex Brothers failed. At that time there was due the plaintiff on the subcontract for the iron work about $500. He demanded payment of this amount from the defendant. The defendant delivered to plaintiff his personal note for $500, payable sixty days from date, and at the same time the plaintiff executed and delivered to the defendant a writing which, after reciting that plaintiff had furnished the iron for the erection of the apartment house and had served a notice of lien, concluded as follows:

"Now, therefore, in consideration of a note of five hundred dollars executed by *B. W. Sangor* to said *Ferdinand Pietsch* and delivered to him, payable on or before sixty days from the date of these presents, it is hereby understood that upon payment to said *Ferdinand Pietsch* of said note, said undersigned, *Ferdinand Pietsch,* waives his lien for the payment of the above amount in the above described property for all the iron and other materials furnished to Lex Brothers as contractors."

When the note became due the plaintiff demanded payment. The defendant *B. W. Sangor* offered to pay the amount thereof upon condition that the plaintiff execute an additional release and waiver of lien, which he refused to do. The defendant *B. W. Sangor* declining to pay unless such release be executed, plaintiff brought this action in the civil court of Milwaukee county against *B. W. Sangor* and Sophie K. Sangor to recover the amount of the note, as well as for certain extras which he claimed to have furnished under circumstances making the defendant Sophie K. Sangor personally responsible therefor. During the pendency of the action the defendant Sophie K. Sangor died, and the action was revived against *B. W. Sangor* as administrator of her estate.

The civil court held that the refusal of the plaintiff to execute a further waiver of the lien as a condition precedent to the payment of the note amounted to a breach of the

contract authorizing a rescission thereof by the defendant *B. W. Sangor,* and that, *B. W. Sangor* having rescinded the contract, plaintiff could not recover on the note. Judgment was rendered, however, in favor of plaintiff and against defendant for $78.48, the amount of the extras which plaintiff claimed to have been furnished.

Upon appeal the circuit court for Milwaukee county reversed the judgment of the civil court, and, upon the record, rendered judgment against *B. W. Sangor* individually and as administrator of the estate for the sum of $500, and against the defendant as administrator of the estate of Sophie K. Sangor judgment was rendered for the further sum of $78.48, the amount of the extras. From the judgment so rendered, and from every part thereof, the defendant appealed.

The cause was submitted for the appellants on the briefs of *Michael Levin* of Milwaukee, and for the respondent on the brief of *Austin, Fehr, Mueller & Gehrz,* attorneys, and *A. W. Schutz,* of counsel, all of Milwaukee.

OWEN, J. For consideration, the judgment may be divided into three parts: first, $78.48 rendered against the defendant *B. W. Sangor* as administrator; second, $500 rendered against him as administrator; and third, the same amount rendered against *B. W. Sangor* personally. As to the first part, the civil court found that extras to the amount of $78.48 were furnished by the plaintiff. This was affirmed by the circuit court. We think the evidence sustains the finding, and nothing further need be said with reference to this part of the judgment.

Should judgment have been rendered against *B. W. Sangor* for the amount of $500, with interest from the date of the note? This turns upon the question whether the defendant *B. W. Sangor* had a right to demand of the plaintiff the execution of a further release or waiver of lien as a condition precedent to the payment of the amount of the

note. In the collateral agreement executed concurrently with the note occurs the following:

"It is hereby understood that upon payment to said *Ferdinand Pietsch* of said note, said undersigned, *Ferdinand Pietsch,* waives his lien for the payment of the above amount, in the above described property for all the iron and other materials furnished to Lex Brothers as contractors."

The civil court held that this called for the execution of a further release or waiver by *Pietsch* before he could insist upon the payment of the note. The circuit court held that the language quoted in and of itself constituted a waiver of the lien, to become effective upon the payment of the note. We agree with the construction placed thereon by the circuit court, and we think that upon the payment of the note the provision quoted became a self-executing waiver or release. Furthermore, the payment of the $500 note in and of itself extinguished the lien, and the execution of a waiver therefore became a superfluous formality. We therefore hold that the defendant *B. W. Sangor* had no defense to the action.

But we have been unable to find any warrant in the record for the judgment against the estate for the sum of $500. The theory upon which the circuit court rendered judgment for this amount against the estate does not very plainly appear. But the respondent seeks to justify it on the following grounds: When Lex Brothers defaulted, Sophie K. Sangor prosecuted an action against the surety company to recover on the bond, and in that action *B. W. Sangor* testified that he had been obliged to pay this $500 to the plaintiff, and it is conceded in this action by *B. W. Sangor* that the $500 was included in the judgment recovered against the surety company. It is claimed by respondent that he is entitled to recover in this action for money had and received, on the theory that the estate received from the surety company the $500 to which plaintiff is entitled. The evidence with reference to this transaction is very meager. It con-

sists entirely of admissions made by the defendant *B. W. Sangor.* He admits that judgment was recovered against the surety company, but the record does not disclose the amount thereof. He admits also that the $500 was included in the judgment. He denies that the entire amount of the judgment has been paid. He says: "Parts of it was paid and part is still unpaid, in which Lex Brothers is still liable to the extent of about thirty-five (hundred) or four thousand dollars. They paid about fifty-five hundred dollars. That was in settlement as compromise." He then testified as follows:

"*Q.* And to help make up the $5,500 you testified paying $500 to *Mr. Pietsch?* *A.* No, sir. *Q.* But you did testify— *A.* I testified paying $500 to show the actual loss sustained by the owner by reason— *Q.* So that to make up your lien you included this $500 item? *A.* To make up the lien, yes. *Q.* And you did collect $5,500 from the bonding company? *A.* Yes, sir."

There is no finding by either court that this $500 item constituted a part of the payment actually made by the indemnity company to the estate, and we think the evidence altogether too meager to justify our conclusion to that effect. This part of the judgment must be reversed and the cause remanded for a new trial upon this issue.

While to accomplish this the entire judgment must be reversed, there need be no further trial with reference to the liability of *B. W. Sangor* on the $500 note nor the liability of the estate for the amount of the extras. Those issues stand adjudicated. The new trial should be confined to the question of the liability of the estate in the sum of $500 for money had and received.

By the Court.—Judgment reversed, and cause remanded for further proceedings in accordance with this opinion.

HELMHOLZ, Respondent, vs. GREENE, Appellant.

January 12—February 8, 1921.

Brokers: Agent or principal: Vendor and purchaser: Qualified acceptance of offer: Right to withdraw offer: Return of deposit upon non-acceptance of offer: Statute of frauds: Necessity of giving notice of acceptance.

1. Where a real-estate broker was offered $11,500 "for the farm of M.," and thereupon telegraphed M. that he had succeeded in interesting a client in the land who offered $9,000, and received a reply from M. directing him to accept the offer, the transaction was one in which the broker was acting as an agent and not one in which as a principal he was buying property from M. to sell to the purchaser.
2. The owner's acceptance of the offer specifying that the purchaser should satisfy the tenant, with whom he claimed to have only a tentative agreement, did not create a binding contract, the stipulation as to satisfying the tenant constituting a material condition.
3. Where the vendor signed a letter accepting the purchaser's offer, but did not send the letter until after he had received notice that the purchaser had withdrawn his offer, there was no binding contract within sec. 2304, Stats., requiring a contract relating to an interest in lands to be in writing.
4. The mere signing an acceptance of a written offer to buy land without communicating the acceptance to the vendor does not create a contract within the meaning of the statute of frauds.
5. A written offer to purchase land specifying that the proposition is subject to acceptance before a specified date, if not based on a consideration may be withdrawn at any time before acceptance.
6. Where the written offer to purchase specified that in the event of non-acceptance of the offer the amount paid was to be returned, the purchaser was entitled to such amount where there was no valid acceptance of the offer.

APPEAL from a judgment of the circuit court for Milwaukee county: JOHN J. GREGORY, Circuit Judge. *Affirmed.*

Action to recover the sum of $1,000 with interest, which sum plaintiff handed to defendant accompanying an offer for the purchase of real estate and to apply thereon. Plaintiff claimed that the offer was withdrawn and not, therefore,

lawfully accepted. Defendant counterclaimed for $2,500, or $1,500 in addition to the $1,000 previously paid, as lost profits due to plaintiff's failure to perform the contract which defendant claims was formed by an acceptance of plaintiff's offer. Trial in the civil court of Milwaukee county without a jury resulted in a judgment for the defendant. On appeal to the circuit court the judgment was reversed and judgment entered for the plaintiff. From this judgment the defendant brings this appeal.

On February 5, 1919, appellant, a real-estate dealer with an office in the city of Milwaukee, came to respondent's office in one of the suburbs and had a personal interview with him concerning the purchase by respondent of a certain farm property in Milwaukee county belonging to one Meyer, who lived in New York. After some talk appellant dictated, and respondent signed, the following writing, which was thereupon delivered to appellant:

"Helmholz Mitten Co.
"Manufacturers of Leather Gloves and Mittens.
"Cudahy, Wis., Feb. 5, 1919.

"*Mr. Nathanael Greene,* Milwaukee, Wis.

"Dear Sir:

"I hereby offer you eleven thousand five hundred ($11,500) dollars cash for the farm of Mr. Louis Meyer, on the Green Tree road, Milwaukee county.

"I am inclosing herewith check of one thousand (1,000) dollars, to your order, which you can use in closing the deal, provided I can buy it at that figure.

"This proposition is subject to acceptance to buy on or before February 24, 1919. In event of the non-acceptance of the proposition the $1,000 paid is to be returned.

"Very truly yours,

WRH/MC "W. R. HELMHOLZ."

There is some dispute whether appellant represented that he was acting as Meyer's agent or whether it was contemplated by respondent that the contract was to be with appellant in person.

After delivery of the offer appellant sent Meyer a telegram reading as follows:

"Letter received; have succeeded in interesting client in entire nineteen acres, will pay nine thousand dollars, cash, deal to be closed March first; as another farm is in consideration please wire instructions immediately."

Appellant received the following telegram in reply:

"Accept nine thousand dollars cash, purchaser to pay commission and satisfy tenant with whom I have only tentative agreement."

In the meantime respondent had talked with appellant by telephone of withdrawing his offer, but had not done so. Appellant received the telegram from Meyer on the morning of February 7th and at once notified respondent by telephone that his offer was accepted. Thereafter he dictated and signed a letter of acceptance and handed the same to some member of his office force with directions that it be mailed to respondent.

In the late afternoon of February 7th there was delivered to appellant a letter from respondent purporting to withdraw his offer. About the same time—the trial judge found that it was shortly before the receipt of the letter of withdrawal, but all the evidence indicates that it was shortly after,—the appellant's letter of acceptance was mailed. It was not received by respondent, however, till a later day.

On February 8th appellant sent the following telegram to Meyer:

"Your telegram of acceptance received. Party has made substantial payment, and now wishes to withdraw. In the event he communicates with you direct, please ignore his communication but forward to me. Write you fully today.

"NATHANAEL GREENE."

For the appellant there was a brief by *Glicksman, Gold & Corrigan* of Milwaukee, and oral argument by *Walter L. Gold.*

For the respondent there was a brief by *Lines, Spooner &*

Quarles, attorneys, and *Rossiter Lines,* of counsel, all of Milwaukee; and the cause was argued orally by *Charles B. Quarles.*

JONES, J. It is claimed in behalf of appellant that this was a transaction in which he was buying the property from the owner and selling it to the respondent. The offer dictated by the appellant, taken alone, might give some color to this claim, but the telegrams and conduct of the parties interested lead us to a different conclusion. The two telegrams sent by appellant to the New York owner are clearly not such messages as a buyer acting for himself would send to an owner. They can bear no other fair construction than this: that appellant had found a client who was willing to buy. The telegram of the owner plainly indicates that he supposed that a third party was buying and that the buyer was to pay appellant's commission. The documentary evidence and the oral testimony lead us to the conclusion that appellant was acting as agent for the owner and that both the owner and the respondent so understood.

It is plain that the owner never subscribed any writing which can be construed as an acceptance of the offer. The only memorandum signed by him which could be regarded as having any approach to an acceptance of the offer of the respondent was conditional. It required the purchaser to satisfy the tenant, with whom he had only a tentative agreement. To satisfy a tenant who has heard all his life that possession is nine points of the law is not always an easy task, and this condition was a very material one.

Even if we were to adopt the theory that appellant was one principal and respondent the other and that there is no element of agency in the case, there is a fatal want of proof to support a judgment in appellant's favor. Sec. 2304, Stats., provides that:

"Every contract for the leasing for a longer period than one year or for the sale of any lands or any interest in land

shall be void unless the contract or some note or memorandum thereof, expressing the consideration, be in writing and be subscribed by the party by whom the lease or sale is to be made or by his lawfully authorized agent."

The offer to buy was made in writing when appellant and respondent were both present on February 5, 1919, and the telegram to the owner was sent on the same day. On February 6th respondent informed appellant that he was unwilling to go on with the deal, but did not expressly withdraw the offer. On the 7th the respondent sent by messenger a letter to appellant withdrawing the offer which was received by him about 5:15 p. m. After this letter was received appellant mailed a letter formally accepting the offer. It is claimed by appellant that he signed this letter, and that it was in existence before the offer was withdrawn, and that the bare *signing* of the notice and handing it to one of his office force before any mailing or delivery to the respondent was a compliance with the statute.

Appellant cites as authority for this contention *Thomas v. Sowards,* 25 Wis. 631; *Campbell v. Thomas,* 42 Wis. 437; and *Singleton v. Hill,* 91 Wis. 51, 64 N. W. 588. In the first of these cases it was held that the delivery of a deed of land in escrow to be delivered to the purchaser on performance of certain agreements on his part did not take an oral contract of sale out of the statute of frauds where the terms of the contract did not appear in the deed. In the second case the grantor deposited a deed with a third person with instructions to deliver to the grantee upon his compliance with certain conditions, but the grantor retained the right of control over the deed. This was held to be not an escrow. It was further held that the grantor did not lose control of the deed merely because its deposit was made in pursuance of a previous oral agreement between the parties for a sale of the land, although a small part of the agreed price was paid at the time of the agreement. In the third case above cited the owner of land had given his agent writ-

ten authority to sell certain lands for $175. The agent negotiated with a purchaser in regard to the sale and received from him a letter making an offer of that amount. The agent communicated this offer to the owner, who by a letter to the agent accepted the offer and agreed to forward the deed. The agent communicated this acceptance to the purchaser, who made a small payment and entered into possession. No claim was made that the land was not sufficiently described or that there had been any attempt to withdraw the offer. It was held that the terms of the statute of frauds were satisfied. In this case the agent through whom the negotiations were carried on was in some respects acting for both parties, and it was properly held that an acceptance given to him and transmitted to the other party was binding.

We do not regard any of these cases as authority for the proposition that the mere signing an acceptance of a written offer to buy land without bringing it to the attention of the vendor or to that of any one acting in his behalf creates a binding contract within the meaning of the statute of frauds. If in the instant case the letter of acceptance had been delivered to the respondent before appellant had received the letter of withdrawal, or if the negotiations had been conducted by mail and the appellant had mailed a letter of acceptance before the notice of withdrawal had been received, very different questions would arise.

The claim of appellant would seem to lead to the result that one to whom an offer is made may sign a memorandum of acceptance, hold it in his possession or in the possession of his agent, and at his option treat it as the closing of a contract, or destroy it. The original statute of frauds was enacted "for prevention of many fraudulent practices, which are commonly endeavored to be upheld by perjury and subornation of perjury." In seeking to observe the spirit and meaning of the statute we feel bound to hold that even if the appellant were to be treated as a principal and not as

an agent there was no valid acceptance of the respondent's offer.

It is urged by appellant's counsel that since the offer was by its terms subject to acceptance until February 24th it could not be withdrawn until that date. The offer was not under seal. There was no presumption of consideration. Unless there was an actual consideration it could be withdrawn before acceptance even during the time limited. 13 Corp. Jur. 293; *Johnson v. Filkington,* 39 Wis. 62. But, it is claimed, the respondent knew that expense would be necessary to submit the offer to the owner. There was ample time to transmit the offer by mail. If in his anxiety to mislead the owner appellant chose to incur the expense of a telegram, we are not disposed, under all the circumstances of the case, to treat the slight expense incurred as sufficient consideration within the meaning of the rule. The expense was so trifling that the maxim *De minimis non curat lex* applies.

It is claimed by appellant's counsel that in any event respondent cannot recover the $1,000 actually paid. The offer contained this language: "In event of the non-acceptance of the proposition the $1,000 is to be returned." Under our holding that there was no valid acceptance of the offer and that the agreement was void, it logically follows that respondent is entitled to a return of his money. In *Brandeis v. Neustadtl,* 13 Wis. 142, where there was a parol contract for the purchase of land and part of the purchase money had been paid, Mr. Chief Justice DIXON said:

"The agreement being void, it is money paid or property delivered without any consideration whatever, from which the law implies a promise of repayment or redelivery, unless the transaction is interdicted by some rule of public policy or sound morals. And I think it is not."

See, also, *Henrikson v. Henrikson,* 143 Wis. 314, 127 N. W. 962; *Carlock v. Johnson,* 165 Wis. 49, 160 N. W. 1053.

By the Court.—Judgment affirmed.

WILL OF BARRETT: WISCONSIN TRUST COMPANY, Trustee, Appellant, vs. MILEY, Executor, Respondent.

January 12—February 8, 1921.

Wills: Interest on legacies: When payable.

1. General legacies do not bear interest until one year after the death of testator unless the will shows a contrary intent; but legacies in payment of debts or for the support of infants, widows, or dependents are exceptions to the general rule.
2. A will bequeathing property in trust which directed the executor to pay the trustee the bequest in money and also directed the trustee to invest the funds and pay the interest to life tenants manifested testator's intention that the life tenants receive interest from the time the legacies were payable to the trustee, which is one year after testator's death.

APPEAL from an order of the county court of Milwaukee county: JOHN C. KAREL, Judge. *Affirmed.*

The action arose on objection of the *Wisconsin Trust Company,* now the First Wisconsin Trust Company, of Milwaukee, to the final account of *John P. Miley,* executor under the will of George M. Barrett, deceased.

George M. Barrett died on November 6, 1916, leaving a will whereby $63,000 was given to the *Wisconsin Trust Company* as trustee. The paragraphs whereby the trusts were created are as follows:

Paragraph 10 gives $3,000 to the *Wisconsin Trust Company* "to hold in trust for the following use and purpose: said sum to be invested by said trustee and $1,000 to be paid with accumulated interest on same to" three different beneficiaries when they shall have reached the age, respectively, of thirty years.

Paragraph 11 provides:

"I give and bequeath to the *Wisconsin Trust Company* the sum of $10,000 to hold in trust for the following use and purpose: said sum to be invested and the interest on same to be paid to my brother, Richard Barrett, and his wife during their lives and the survivor of them; after the death of the

survivor of them, said principal to be paid to their son, James W. Barrett."

Paragraphs 12, 13, and 14 bequeath various sums to the *Wisconsin Trust Company* "to hold in trust for the following use and purpose: said sum to be invested and interest on same to be paid" to the beneficiaries named during their lifetimes, and after their death the principal to be paid to the residuary legatee.

Paragraph 15 bequeaths certain sums to the *Wisconsin Trust Company* in trust to be invested, interest to be paid to the beneficiary during his life and the remainder over to his widow.

Paragraphs 16 and 17 bequeath certain sums to the *Wisconsin Trust Company* in trust, to invest, and the accumulated interest and principal to be paid to the persons named as specified.

The executor, in submitting his final account on May 21, 1918, did not credit the trustee with the income of the first year after death. The trustee entered objection to this on August 5th, contending that the income should be computed on the bequests from the day of death. An order enjoining and restraining the distribution of the estate was made. Hearings were had and the court held, among other things, that the legacies mentioned in the will were paid by the executor without any unnecessary delay on his part; that the bequests in question were general and not specific legacies; that the assets of the estate consisted principally of railroad bonds drawing four per cent. interest.

Judgment was entered dismissing the objections and approving the account as filed. This is an appeal from such judgment.

For the appellant there was a brief by *Glicksman, Gold & Corrigan,* and oral argument by *Malcolm K. Whyte* and *Walter L. Gold,* all of Milwaukee.

Henry J. Killilea of Milwaukee, for the respondent.

SIEBECKER, C. J. The county court held that the executor was not required to pay interest on the bequests above set forth from the date of the testator's death. This holding is challenged on the grounds that (1) since the beneficiaries received from the testator a substantial monthly amount as a gratuity for their support for years prior to his death, the relationship of the beneficiaries to testator was that of dependents, and hence these provisions of the will are within the exception to the rule that interest on a general legacy does not commence to accrue until one year after the death of testator; (2) that they are bequests of the interest for life on funds bequeathed in trust and remainder over, and therefore the life tenant is entitled to interest on the fund from the date of the testator's death; and (3) that the provisions of the will show an intent on the part of the testator that the life tenants were to be paid interest on these funds from his death.

The view we take of this case renders immaterial the exception urged by appellant to the court's refusal to find as a fact that the designated beneficiaries, who were to receive the interest on the funds given in trust, had received substantial financial assistance from testator in his lifetime for their necessary support and maintenance. It is the rule that general legacies do not bear interest until one year after the date of testator's death, unless the will shows a contrary intent, and for the reason that in law such legacies are not due until one year after testator's death. "Though the testator directed payment of the legacy 'as soon as possible,' or 'with interest,' this does not change the rule; nor are phrases readily construed as justifying later payments without allowance of interest." 2 Schouler, Wills, § 1481. If the will shows a clear intent of testator that interest is to be paid from death, the bequest carries interest. Legacies in payment of testator's debts, or for support of infants, widows, or dependents, are held to be exceptions to the foregoing

general rule, and interest thereon is allowed from the date of the testator's death. *Ibid.* § 1482; 1 Underhill, Wills, §§ 428, 429; 3 Redfield, Wills, § 186.

In *Welsh v. Brown,* 43 N. J. Law, 37, the court, in dealing with the subject of life legacies and interest thereon, held that general legacies are to be paid out of testator's estate at the expiration of one year from testator's death, and if not so paid will bear interest as damages from that date. The exceptions to this rule are specified by the court. The court also adverts to the distinction between an annuity and the bequest of the interest of a specified sum. Respecting the bequest of such interest it holds: "It is not a stated sum, but may be more or less, according to the earning of the capital; in this respect it does not possess the characteristics of an annuity, but is merely interest or income. It is payable annually; in this respect it possesses a characteristic common alike to an annuity and to interest, but not peculiar to either." *Marsh v. Taylor,* 43 N. J. Eq. 1, 10 Atl. 486; *Flummerfelt's Ex'rs v. Flummerfelt,* 51 N. J. Eq. 432, 26 Atl. 857; *Fenton v. Hall,* 235 Ill. 552, 85 N. E. 936; 2 Alexander, Wills, § 666. In *Evans v. Foster,* 80 Wis. 509, 50 N. W. 410, this court approves the rule that general legacies are not due until one year after testator's death and that interest begins to run thereon from the expiration of one year from such death.

Do the provisions of the will, in the light of the facts surrounding the testator, indicate that he intended that interest should be paid to the life tenants on the legacies put in trust for their benefit? All of the bequests to the trust company for benefit of life tenants are directed to be held in trust for the purposes specified, with the specific direction that the sums so bequeathed *shall be invested by the trustee* and the interest thereon paid to the life tenants. It is evident that the testator expected his executor to take possession of his estate and to make payment of these bequests in the usual course of administration of his estate. It is not

to be inferred that he expected that he would accomplish this in less than one year. It is to be noted that he directs the executor to pay to the trustee the specified bequests in money. His estate consisted largely of securities which he evidently intended the executor should convert into money to enable him to pay the trustee these legacies. The trustee is directed to invest the funds and pay "the interest on the same" to the designated beneficiaries. These provisions manifest an intention by the testator that the life tenants were to receive the interest on the legacies he provided for them from the time they were payable to the trustee, which is one year after his death.

It is considered that the court correctly held that the executor was not required to pay the trustee interest on the legacies in question for the year following testator's death.

By the Court.—That part of the order appealed from by the *Trust Company* is affirmed.

SAMUEL MEYERS, INC., Appellant, vs. OGDEN SHOE COMPANY, Respondent.

January 12—February 8, 1921.

Assignments: Test of assignability: Actions for deceit: Contracts made by promoters of corporation: Leases: Adoption by corporation: Estoppel to deny existence of corporation: Judgment: Correction of clerical error.

1. The test of the assignability of an action in tort is whether the action would survive; and an action for deceit does not come within the class designated by the statute.
2. A valid agreement with promoters for the benefit of a corporation to be organized need not necessarily be assigned to the corporation, since the latter may adopt the contract if within its powers and enjoy its benefits and assume its liabilities.
3. Defendant, sued for false representations made to the promoters of the plaintiff corporation in negotiations with defendant for a lease, is not estopped to deny the existence of plaintiff as a *de facto* corporation, it not being such a corporation at the time the representations were made.

4. A lessee corporation cannot be held to have adopted an agreement made with its promoters for the lease of rooms served with alternating electric current when its officers, with full knowledge that such current was no longer furnished, executed a lease making no provision for such current or its continuance, but must be held to have waived the claim so that it could not sue the lessor on the theory that it had adopted such agreement and was entitled to its benefits.
5. Where costs were ordered for respondent in the civil court of Milwaukee county and taxed in the usual manner, but through the inadvertence of the clerk of the court the amount was not inserted in the judgment as directed by sec. 2927, Stats., and the circuit court ordered and entered costs taxed in the civil court, no motion being made to review the taxation in either court, *held,* that the circuit court had jurisdiction to remedy the error.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *H. H. Heilbron* and *Adolph Kanneberg,* both of Milwaukee, and oral argument by *Mr. Kanneberg.*

For the respondent there was a brief by *Lines, Spooner & Quarles,* and oral argument by *James T. Guy,* all of Milwaukee.

JONES, J. Two partners doing business in Chicago concluded to form a corporation in Wisconsin for manufacturing raincoats in Milwaukee. They negotiated with an agent of the respondent defendant as to renting the fifth story of its building. Defendant was informed that they could not use the space unless it was served with alternating electric current; that the promoters were not fully organized as a corporation, but that the articles had been filed. They paid $150 for the first month's rent, and it was agreed that the machinery might be at once installed and that a written lease would be executed. These negotiations took place December 24, 1918.

The defendant had moved out of the premises in the latter

part of October. On November 7th the meter was removed by the Milwaukee Electric Railway & Light Company, and on December 27th the same company removed the transformer and service wires. On January 8 or 9, 1919, the promoters of the corporation shipped their machinery from Chicago, and on January 15th they discovered that there was no alternating current and that their power machines and electric motors could not be used with the current furnished. When the discovery was made they went to the electric company and negotiated to have the current changed. They also informed defendant that they would hold it liable. On January 18th the plaintiff was organized and came into existence, and on January 22d a written lease was completed and delivered which contained no agreement for alternating current. The defendant did not know that the meter and transformers had been removed until informed by one of the promoters.

The case was first tried in the civil court of Milwaukee county, and the court found, among other things, that plaintiff failed to prove that any false representations were made to the plaintiff; that defendant's agent did represent to one of the promoters that the premises were then served with alternating current; that the representation was false; that it was not the duty of the promoters, in the exercise of ordinary care, to discover that the representation was false and that they relied on it; that when the plaintiff corporation came into existence it knew the character of the current and was not deceived; that plaintiff failed to prove that if there was a cause of action it was acquired by said plaintiff; that it became necessary for plaintiff to install new machinery, and that by reason thereof it sustained damage to the amount of $550. Judgment was rendered in favor of the defendant and for costs, and it was affirmed by the circuit court.

The complaint is so framed as to sound in tort, since it alleges that the defendant, with intent to defraud and deceive, made the representations and that defendant ought

to have known that they were false and they were made recklessly and with no knowledge on the subject. But in the brief of appellant the action is treated as one on contract that there was alternating current.

There was no assignment by the promoters to the plaintiff. If the action is to be treated as one in tort it is probable that no assignment would be effective, since the test of assignability is whether the action would survive, and an action for deceit does not come within the class designated by the statute. Under the present liberal rules of pleading it would not follow that the complaint should have been dismissed because of a mistake in framing the complaint, if the proofs showed that there was a cause of action in favor of the plaintiff either in tort or on contract. Nor does it necessarily follow that the plaintiff could not recover because a contract was made with the promoters only and that it was not assigned. If a valid agreement is made with the promoters for the benefit of a corporation to be organized, by the weight of authority the corporation may adopt the contract if within its corporate powers and may enjoy the benefits and be subject to the liabilities thereof. *Pratt v. Oshkosh M. Co.* 89 Wis. 406, 62 N. W. 84; 1 Thompson, Corp. (2d ed.) § 90.

Counsel for appellant argue that defendant is estopped to deny the existence of the plaintiff as a *de facto* corporation and cite authorities to that proposition. The fallacy of the argument is that plaintiff was not a *de facto* corporation when the representations were made to the promoters. This is so plain on the facts that it is unnecessary to state the requisites of a *de facto* corporation or to cite authorities on the subject.

Assuming that there might be relief granted according to the facts proved and irrespective of the form of the complaint, there is a very serious obstacle to a recovery by the plaintiff. The claim most favorable to the plaintiff is that an agreement was made with the promoters of the proposed

corporation that the rooms were served with alternating current and would continue to be so served, and that the agreement was relied on and was adopted by the corporation. It seems clear that the plaintiff corporation did not adopt the agreement alleged. On the contrary its officers, with full knowledge that alternating current was no longer furnished, executed a lease making no provision in respect to it or its continuance. We consider this fact such a waiver of the claim that the case does not come within the class of cases where a corporation may maintain an action on an agreement made by its promoters, on the theory that it has adopted the agreement and is entitled to its benefits. Whether the promoters as individuals could maintain an action on the alleged agreement is not a question before us and we express no opinion on that subject.

Appellant's counsel claim that the circuit judge erred in allowing costs to respondent. The costs were ordered for respondent in the civil court and were taxed in the usual manner, but the clerk of the court through inadvertence failed to insert the amount in the judgment as directed in sec. 2927, Stats. In the circuit court judgment was ordered and entered for the costs taxed in the civil court. Thereafter appellant made a motion to strike from the judgment the costs allowed in the civil court, which motion was disallowed. No motion was made by appellant to review the taxation of costs in either court. The omission of the clerk of the civil court to insert the costs in the judgment was due to no fault on the part of the defendant or its attorneys, and was one of those inadvertencies or clerical mistakes which in our judgment the trial court having jurisdiction of the whole matter had the power to remedy. We hold that the judgment appealed from properly included the costs.

By the Court.—Judgment affirmed.

ESTATE OF MILLER: NEELEN, Administrator, Appellant, vs. WELLS BUILDING COMPANY, Respondent.

January 12—February 8, 1921.

Landlord and tenant: Termination of lease: Reletting by lessor: Death of lessee: Filing of claim for rent against lessee's estate: Claim as notice of non-termination: Consideration for lease: Mutuality: Duty of lessor to collect rent from occupant.

1. Where the son of a lessee entered leased premises shortly prior to the death of his father, and the furniture and professional equipment of the deceased remained upon the premises until the termination of the lease, there was no reletting of the premises to the son so as to operate as a termination of the lease and a discharge of the lessee's estate from liability, although the lessor accepted rent paid by the son. The filing of a claim by the lessor against the estate of the lessee for the amount of the rent due for the entire period of the lease was notice to the administratrix that the lessor elected to hold the estate for the rent for the entire period, and not to terminate it, as it might have done under the lease.
2. A lease containing a clause that the lessor should not be liable for any loss or damage sustained by the lessee by reason of any act or neglect of any contractor, employee, agent, or servant of the lessor or other person, and that such loss or damage should not abate or reduce the rent of the premises, was not void for lack of mutuality as to consideration on the ground that the lessee did not have an assurance of peace and enjoyment, the question as to whether or not a consideration is adequate being a matter exclusively for the decision of the parties.
3. Where, upon the death of the lessee, the lessor elected to hold his estate liable for the rent, there was no obligation on the part of the lessor to use diligence to collect rent from the son, who was occupying the premises, the latter being under no obligation to pay to the lessor.

APPEAL from a judgment of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Affirmed.*

Action for rent. The facts can be best presented by a condensation of the findings made by the trial court. On April 22, 1914, Wilmot F. Miller entered into a lease with the *Wells Building Company,* whereby the latter leased to the former, the intestate, rooms 201 to 204 of the Stephen-

son building, located at the corner of Mason and Milwaukee streets, for a period of three years beginning May 1, 1914, and ending April 30, 1917, for a total consideration of $1,980 for the term, being at the rate of $55 per month, the premises to be used as the offices of the said intestate in the practice of medicine. The lease contained the usual covenants as to the payment of rent, and others which will be more specifically referred to later.

On the 14th day of August, 1914, Wilmot F. Miller died, and thereafter letters of administration were duly granted to his widow upon proceedings duly had, and notice was given to creditors to file claims against the estate.

On the 2d day of November, 1914, the *Wells Building Company* filed a contingent claim in the county court against the estate of Wilmot F. Miller, deceased, said claim being verified, and asserted the liability of the estate of Wilmot F. Miller under the lease for the months from November, 1914, to April, 1917, both inclusive, such monthly rent to become absolute upon the first of each and every month during the unexpired term of the lease.

"4. That sometime shortly prior to the death of said Wilmot F. Miller, his son, Wilmot Paul Miller, practicing physician, entered the office of said deceased, Wilmot F. Miller, for the practice of his profession; that after the death of said intestate, the son, Wilmot P. Miller, continued to occupy the premises presumably for the practice of medicine, and did occupy it to the termination of the lease; that the testimony does not show what arrangement, if any, was made between the administratrix and her son, the said Wilmot P. Miller; that no agreement was made nor any understanding had between the administratrix and the claimant, *Wells Building Company,* as to the occupancy of the premises by the son of said intestate; that said claimant did not serve any notice on the administratrix to quit, nor in any other way terminate the tenancy under the lease; that the testimony does not show that the administratrix or any one for her ever tried to surrender the premises by giving up the keys or otherwise or to sublet or assign the premises so leased, either with or without the consent of said claimant; that the furni-

ture and professional equipment of said deceased, Wilmot F. Miller, continued to remain in the premises leased after the death and until the termination of the lease.

"5. That rental was paid under said lease and receipts therefor issued at the times, for the amounts, and in the names of the persons as shown below:

Date.		Amount paid.	Month to which credited by claimant.	Receipt issued in the name of—
			May, 1914	W. F. Miller.
1914			June "	"
June	1	$55		
June	23	55	July "	Est. of W. F. Miller
1915			Aug. "	
Aug.	9	110	Sept. "	W. F. Miller.
1914			Oct. "	"
Sept.	4	55	Nov. "	"
Oct.	6	55	Dec. "	"
Nov.	2	55		
Dec.	4	55	Jan. 1915	"
1915			Feb. 1915	"
Jan.	5	55	Mch. 1915	"
Feb.	5	55	Apr. 1915	"
Mch.	10	55	May 1915	"
Apr.	3	55	June 1915	
May	8	55	July 1915	W. P. Miller.
Aug.	9	110	Aug. 1915	W. P. Miller.
Sept.	27	110	Sept. 1915	
Total		$935		

Rent in lease	$1,980
Less paid	935
Balance due	$1,045

"That there remained due and unpaid $1,045.

"8. That the general provisions of said lease which are material herein are as follows:

"(1) That in case said lessee ..... shall abandon or remove from said premises before the end of said term, then and in such case said lessor, immediately or at any time afterwards, without notice and without waiving or postponing any right against said lessee, may relet said premises or any part thereof, on such terms as it shall deem best, and apply the proceeds from time to time, less expenses, including the cost of repairs and collection, on such rent, work, materials, service and interest, or judgment therefor, and hold said lessee for the balance unpaid on account thereof.

"(2) In case said lessee shall die ..... or shall abandon or remove from the premises before the end of said term or shall make or suffer any breach or default of or in respect to any covenant or condition hereof, or the title or interest of said lessee in or to this lease or in or to said demised premises by virtue of this lease shall in any way be changed or transferred by operation of law, then and in each such case said lessor may terminate this lease on any certain day, without prejudicing its right to recover and collect any moneys already or then becoming due and payable pursuant to the terms hereof, by mailing prior written notice of its intention so to do, addressed to said lessee, at Milwaukee, Wisconsin, and such notice having been mailed, this lease shall terminate on the day named therein, and said lessor may re-enter said premises, take possession thereof and expel said lessee therefrom.

"(3) That said lessor shall not waive any breach or default, nor accept any surrender of said premises, nor prejudice any right under this lease ..... by receiving from said lessee any moneys or keys whatsoever, or otherwise except expressly in writing.

"(4) That said lessee, upon the termination of this lease, shall deliver all keys to locks and explain all combinations to keyless locks upon said premises to said lessor at said office of Upham, Black, Russell & Richardson.

"(5) Said lessee covenants to pay the rent above reserved as above provided.....

"(6) Said lessor and lessee mutually covenant that this lease and all the conditions and covenants therein contained shall extend to and be binding upon their respective successors, personal representatives, heirs and assigns....."

The claim of the company was allowed by the county court of Milwaukee county on June 11, 1919, the claim having become absolute. Judgment was entered for the amount with interest, from which the administrator *de bonis non* of the estate of Wilmot F. Miller appeals.

For the appellant there were briefs by *Bohmrich & Gabel* and *Bloodgood, Kemper & Bloodgood,* attorneys, and *Emmet Horan, Jr.*, of counsel, all of Milwaukee; and the cause was argued orally by *Mr. Horan.*

For the respondent there was a brief by *Upham, Black,*

Russell & Richardson, attorneys, and *Charles W. Reeder,* of counsel, all of Milwaukee; and the cause was argued orally by *Mr. Reeder.*

ROSENBERRY, J. It is the contention of the appellant that the occupancy of the premises by the son, Wilmot P. Miller, subsequent to the death of his father, and payment of rent by him, terminated the tenancy as of that date, and that such occupancy operated to create a new tenancy, which was at least a constructive eviction of the administratrix of the estate as a tenant. That the son, Wilmot P. Miller, did occupy the leased premises and remained in the occupancy thereof until the termination of the lease is established without dispute. There being no finding of the trial court as to the nature of the occupancy, it is the contention of appellant that the son occupied the premises for his own purposes; that it not appearing that the son was the assignee or subtenant of the administratrix or as agent of the administratrix, he must, as a matter of law, have occupied them as the tenant of the company with the consequences stated. The findings of the trial court show that the son entered the premises shortly prior to the death of his father; that the furniture and professional equipment of the deceased, Wilmot F. Miller, remained upon the premises until the termination of the lease. The vital question is whether or not there was a reletting of the premises. If there was, there is no doubt that such reletting, in the absence of qualifying circumstances, would operate to terminate the lease. The situation that existed shortly prior to the death of the lessee continued practically unchanged to the time of the termination of the lease, with the exception of the death of the lessee and the payment of some instalments of rent by the son. The trial court evidently concluded that there was no reletting either by express agreement or otherwise, and we think the evidence and findings fully justify the trial court in that conclusion. The mere acceptance of

rent paid by the son did not operate to discharge the lessee or his estate from liability under the terms of the lease. *Lovejoy v. McCarty,* 94 Wis. 341, 68 N. W. 1003. In the cases cited to our attention by the appellant there was some act by the landlord other than the mere acceptance of rent from a third person. Here there was no new lease for the whole or any part of the term embraced in the lease in question, consequently there could be no surrender in law, as in *Bailey v. Wells,* 8 Wis. 141. The filing of a claim by the lessor for the amount of the rent due for the entire period was notice to the administratrix that the lessor elected to hold the estate for the rent for the entire period and not to terminate it as it might have done under the provisions of the lease.

The appellant further argues that the lease is void for lack of mutuality as to consideration. The lease contained a clause which provided that the lessor should not be liable for any loss or damage sustained by the lessee by reason of any act or neglect of any contractor, employee, agent, or servant of said lessor or other person, and that any such loss or damage should not abate or reduce the rent of the premises, and other provisions that the landlord should not be liable for failure to repair and for defects, etc., the contention of the appellant being that unless the lessee receives an assurance of peace and enjoyment he receives nothing of value. If the contention here is that by reason of the limitations placed by the terms of the lease upon the liability of the lessor there was not a sufficient consideration, it is certainly not a sound one. If the lessee chose to accept the premises under the conditions specified in the lease, there was ample consideration moving from the lessor to support the contract. Whether or not a consideration is adequate is a matter exclusively for the decision of the parties. 1 Williston, Contracts, § 140.

It is the further contention of the appellant that the lessor did not use due diligence to collect the rent from

Wilmot P. Miller. If there was no reletting and no lease existed between Wilmot P. Miller and the lessor, there was no obligation on the part of the lessor as to collection of rent from him. If Wilmot P. Miller was in possession of the premises under and by virtue or with the consent or knowledge of the lessee, it was the duty of the lessee to look out for the collection of rent from the person who was in actual occupation. The lessor had elected by filing its claim to hold the estate of the deceased lessee. It is not apparent, therefore, how the lessor can be held negligent by reason of its failure to collect the rent from a third party who was under no obligation to it to pay.

By the Court.—Judgment affirmed.

WILL OF SAVELAND.

January 13—February 8, 1921.

Appeal and error: Affirmance by divided court.

Where the justices of the supreme court are equally divided in opinion on the question involved on an appeal, the judgment appealed from will be affirmed.

APPEAL from a judgment of the circuit court for Milwaukee county: GUSTAVE G. GEHRZ, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *Simmons & Walker* of Racine, and oral argument by *John B. Simmons.*

For the respondents there was a brief by *Lawrence A. Olwell,* attorney, and *Olwell, Durant & Brady,* of counsel, all of Milwaukee; and the cause was argued orally by *Lawrence A. Olwell.*

ESCHWEILER, J. The judgment of the court below affirmed a judgment of the Milwaukee county court construing certain provisions of a will.

Upon the hearing here Mr. Justice KERWIN did not participate. Mr. Justice VINJE, Mr. Justice ROSENBERRY, and

Mr. Justice JONES are of opinion that the judgment should be affirmed; Mr. Chief Justice SIEBECKER, Mr. Justice OWEN, and the writer that it should be reversed. Under the rule it must therefore be affirmed.

By the Court.—Judgment affirmed.

MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Respondent, vs. CITY OF MILWAUKEE, Appellant.

January 13—February 8, 1921.

Electricity: Ordinance requiring free electricity for city: Validity: Effect of public utilities act: Estoppel: Constitutional law: Debt incurred by municipality: Provision for retirement: Depreciation: Milwaukee city charter: Contracts of city: Validity.

1. An ordinance of the city of Milwaukee passed in the year 1890, permitting electric companies previously prohibited from consolidating by ordinances purporting to grant franchises to them, to consolidate in consideration that the consolidated company furnish electricity for certain purposes to the city free of charge, is void, the permit to consolidate being no consideration for the agreement to furnish free current, in view of the invalidity of the prior ordinances attempting to prevent the consolidation of the companies, such regulations being beyond the city's police power and the city having no power to stipulate for free service.
2. Sec. 1797*m*—89, Stats., has been construed to amend franchises of existing utilities and to supersede them when the utility secures an indeterminate permit under sec. 1797*t*—3; and a contract by an electric company to furnish free electricity to the city is likewise superseded when the company began to operate under an indeterminate permit. *Oshkosh v. Eastern Wis. E. Co.* 172 Wis. 85, distinguished.
3. Such contract was not validated by sec. 1797*m*—87, empowering cities to prescribe conditions upon which a public utility may be permitted to occupy the streets not inconsistent with the provisions of the public utility act—a contract to give the city free electricity being inconsistent with such act.
4. The electric company's contract to furnish the city electricity free of charge, invalid because not made by the city in its proprietary capacity and because not supported by a consideration, was not validated by the enactment of the public

utility act (sec. 1797*m*—91, Stats.), providing that the charging of rates provided for in an existing contract executed prior to April 1, 1907, shall not constitute a discrimination. *Superior v. Douglas Co. Tel. Co.* 141 Wis. 363, distinguished.

5. The acceptance by the electric company of an ordinance requiring it to furnish electricity to the city free of charge did not preclude the company, while operating under an indeterminate permit, from claiming that the ordinance was *ultra vires*, since, having become subject to the restrictions of the indeterminate permit, the company became entitled to its benefits.
6. Sec. 3, art. XI, Const., requiring a municipal corporation incurring any indebtedness to provide for the collection of a direct annual tax sufficient to pay interest as it falls due and to pay the principal within twenty years, is inapplicable to a city's contract with an electric company requiring the company to operate and maintain a park electric lighting system, terminable after two years by the city's acquisition of title to the plant, upon payment to the company of the difference between the special investment in the park lighting system and the accumulated depreciation reserve provided for at the date of termination, in the absence of proof that the depreciation reserve exceeded its legitimate limits and the charge therefor was so excessive as to constitute a payment upon capital.
7. A charge for depreciation is a necessary and proper element of the cost of each year's service and is in the nature of an expense of operation, and provision should be made therefor out of earnings.
8. Sec. 16, ch. V, and sec. 16, ch. VI*a*, of the Milwaukee charter, requiring the city to submit contracts for the purchase of "supplies or material" to competitive bidding, are inapplicable to a contract for electricity to light a city park by equipment to be installed by the electric company, giving the city the option, on expiration of a specified period, to terminate the contract and purchase the plant.
9. Sec. 13, ch. V, of the Milwaukee charter, requiring contracts entered into by the commissioner of public works to be countersigned by the comptroller and to be examined and approved by the city attorney; sec. 16, ch. VI*a*, giving the board of park commissioners the same powers and authority as to parks previously possessed by the common council and the board of public works; and sec. 13. ch. III, requiring the comptroller to countersign all contracts made in behalf of the city, did not require the park board's contract for the electricity to light a city park to be countersigned by the comptroller and approved by the city attorney, in view of the legislative history of such charter provisions and of the nature of the comp-

troller's duties under secs. 12–17, ch. III, and secs. 13–15, 18, 19, ch. V, and the general nature of the duties and authority of the park board, under secs. 16, 18, 18*a*, 20–22, ch. VI*a*.

APPEAL from a judgment of the circuit court for Milwaukee county: CHESTER A. FOWLER, Judge. *Affirmed.*

Two causes of action to recover for electric service furnished to the city of *Milwaukee,* or certain of its boards and departments, at rates of charge alleged to have been established therefor by the railroad commission of Wisconsin. Plaintiff company had judgment on both causes of action in the trial court, and defendant city brings this appeal from the whole of the judgment. The appeal is presented on the pleadings and the decision of the trial court without a bill of exceptions.

First cause of action.

The first cause of action is to recover for electrical energy furnished for the operation of four of the city's drawbridges. None of these particular bridges was occupied by any of the property of the respondent company, yet it has been paid nothing for the service. This came about in the following way:

On the 21st of November, 1885, the *Milwaukee* common council passed an ordinance purporting to grant to the Badger Illuminating Company the right to maintain lines in the city's streets for furnishing electric current, and providing that the said company should not pool or assign its interests nor consolidate with any other electric light company which might thereafter obtain a "franchise" to do business in the city, and providing that upon pooling or consolidating without consent of the council the ordinance should be void. On October 7, 1889, a similar ordinance was passed for the Edison Electric Illuminating Company prohibiting consolidation and the like with any other company which might theretofore or thereafter have obtained a "franchise."

On December 1, 1890, the council passed an ordinance purporting to amend the two prior ordinances so as not to prohibit the consolidation of the two companies, upon condition that the consolidated company furnish the power necessary to turn certain named bridges, including the four bridges here involved, free of charge to the city, and providing that if the consolidated companies should fail to furnish such power it should be considered a forfeiture of all their "franchises."

The two companies were consolidated, and respondent company thereafter became the owner of whatever rights the companies had by reason of these ordinances and has furnished the service required.

The railroad commission established a schedule of rates for electric power service furnished by respondent company in *Milwaukee* which was effective during the period from December 1, 1912, to the time of bringing this action, and the action is to recover at these rates for the service rendered during this period, it being claimed by respondent company that the agreement to furnish the service free of charge was void in its inception, and that in any case it was relieved of the obligation by the passage of the "public utility" act and the "indeterminate permit" act and proceedings had thereunder.

The trial judge found the facts substantially as here summarized. He concluded that the rate fixed by the railroad commission was applicable to this service and that the respondent was entitled to recover.

Second cause of action.

The second cause of action is to recover for a balance claimed to be due and unpaid upon one month's charge for electric lighting in Lake Park in the city of *Milwaukee.*

On August 3, 1916, respondent company entered into a written contract with the board of park commissioners of the city for the installation and operation of an electric lighting system in the park. The contract purported to be

executed by the board acting for the city. By it the company agreed to install the system, furnish the current, and otherwise operate and maintain the system. The arrangement was to continue for an indeterminate period, terminable after two years upon six months' notice by the board. The rates of charge for the first year were fixed to cover three groups of costs, group "A" covering such costs as were incurred jointly by the park lighting and other public service, and groups "B" and "C" covering such costs as were incurred by the special facilities for the park lighting. It was provided that the charges should be subject to adjustment in consequence of change in any of the groups of costs; that group "A" should be subject to review under the public utility act, and that groups "B" and "C" should be revised annually according to the investment in the special equipment installed and the cost experience in operating it, respectively. Among the costs in group "B" was a charge of four per cent. per year upon the special investment for park lighting to "insure replacement (depreciation reserve)," to which reserve interest was to be credited semi-annually at the rate of four per cent. upon the accumulated reserve and from which the cost of special investment retired from the service was to be deducted from time to time. The sum of the "A" costs as revised from time to time under the utility act, and the "B" and "C" costs as revised annually, was to constitute the price payable in equal monthly instalments during each contract year. It was further provided that upon the termination of the agreement at the election of the park board, as therein provided, it would pay to the company the difference between the special investment in park-lighting equipment and the accumulated depreciation reserve at the date of termination, and that the title to the special equipment should thereupon be acquired by the board.

The agreement was entered into without calling for bids and was executed by the park board without being

countersigned by the comptroller or approved by the city attorney as to form and execution.

A lighting system was constructed and during October, 1918, was operated by current furnished in accordance with this agreement, and the service was accepted and received by appellant city.

On September 14, 1918, the railroad commission entered an order increasing the rates for park lighting by adding a surcharge to the group "A" of costs mentioned, and this cause of action is to recover the difference between the amount paid and the full charge as thus increased for the month of October, 1918, the first month in which the increase was operative. In refusing to pay this amount the city contends that the contract of August 3, 1916, is invalid.

The trial court concluded that the rates fixed in the contract of 1916 as modified by the order of the railroad commission were the lawful rate of charge for the park-lighting service, that the utility act forbade furnishing or receiving the service at any other rate, and that regardless of the validity of the contract, a matter not decided by him, the respondent was entitled to recover the *quantum meruit* at the rate fixed by the commission.

For the appellant there was a brief by *Clifton Williams*, city attorney, and *Walter J. Mattison*, assistant city attorney, and oral argument by *Mr. Mattison*.

For the respondent there was a brief by *Van Dyke, Shaw, Muskat & Van Dyke* of Milwaukee, and oral argument by *James D. Shaw*.

JONES, J. In these two causes of action counsel on both sides attack agreements between the city and the electric company as invalid and unconstitutional. In the first cause of action counsel for the company allege that certain portions of the ordinances involved were wholly unauthorized. Counsel for the city argue that even if this were true the company is estopped from raising the question. In the

second cause of action counsel for the city allege that the contract was wholly void, and counsel for the company reply that the city is in no situation to make such a claim. It might not be easy to reconcile these apparent inconsistencies, but neither lawyers nor statesmen are held to any very rigid rule of consistency; even the courts have been known to depart from it.

Although the validity of portions of the ordinances set forth in the statement of facts was ably and elaborately discussed by counsel on both sides it was not passed upon by the trial judge, and on account of the view we take of another branch of the case it does not seem necessary to indulge in as full discussion of the ordinances involved as might otherwise be necessary.

Counsel on both sides are agreed that the ordinances of 1885, 1889, and 1890 were not franchises but were mere licenses, and that there was then no statutory authority in cities to grant franchises to electric companies. Ch. 192, Lawe 1893 (sec. 1780*b*, Stats. 1898), did give authority to such companies, "with the consent of, and in the manner agreed upon with the authorities of any city or village," to use the streets; and the provisions of the statute were made to apply to any corporation theretofore organized and then operating its plant by consent of the municipality.

In the case of *La Crosse v. La Crosse G. & E. Co.* 145 Wis. 408, 130 N. W. 530, this statute was construed. Subject to the statute an ordinance called a franchise was given to an electric company requiring it to pay into the treasury of the city two per cent. of its gross earnings in addition to such other taxes as were provided by law. It was held that the language of the statute contemplated no more than police regulations and that the requirement objected to was void. In *State ex rel. Wis. Tel. Co. v. Sheboygan,* 111 Wis. 23, 86 N. W. 657, the city claimed the right, in granting a so-called franchise, to impose various conditions, such as that the city might fix rates of charges, that the company

must consent to sell its privileges at an appraised value, consent to the free use by the city of a part or all of its poles, and consent to other uses of the property by the city. This court held that the company derived its powers directly from the state, that no power was given to the city to fix rates, nor to exact the right to buy the exchange, nor to use the poles of the company, nor to control competition. Although the decision recognized the right of reasonable regulation by the city, it was held that these conditions attempted to be imposed were not within the purview of police regulations. In the case of *Kenosha v. Kenosha Home Tel. Co.* 149 Wis. 338, 135 N. W. 848, it was held that an ordinance purporting to grant to the telephone company the right to operate a general telephone system in the city was void; that the only franchise needed by the company was the franchise conferred by the statute; that the provision in the ordinance that the company should furnish to the city free telephone service was not a contract; and that the city could not barter the exercise of its police power for free telephones. See, also, *Wis. Tel. Co. v. Milwaukee,* 126 Wis. 1, 104 N. W. 1009; *State ex rel. Smythe v. Milwaukee Ind. Tel. Co.* 133 Wis. 588, 114 N. W. 108, 315.

It follows from the cases above cited that the city of *Milwaukee* had no power to grant a franchise to the company when any of the ordinances involved were enacted; that the provisions in the ordinances of 1885 and 1889 attempting to prevent the consolidation of the companies were beyond the police powers of the municipality and invalid; that the amendment of these ordinances by that of 1890 furnished no consideration for an agreement to furnish free current; and that the city had no power to stipulate for free service in its amended ordinance of consent.

It is claimed by counsel for the company that even if there had been a valid agreement to furnish free current it would be superseded by the public utility act. The company has been operating under an indeterminate permit since

July, 1911. Sec. 1797*m*—89, Stats., has been repeatedly construed by this court to amend the franchises of existing utilities and to supersede them under circumstances analogous to those of the instant case. *Manitowoc v. Manitowoc & N. T. Co.* 145 Wis. 13, 129 N. W. 925; *La Crosse v. La Crosse G. & E. Co.* 145 Wis. 408, 130 N. W. 530; *Calumet S. Co. v. Chilton,* 148 Wis. 334, 135 N. W. 131; *Kilbourn City v. Southern Wis. P. Co.* 149 Wis. 168, 135 N. W. 499; *Kenosha v. Kenosha Home Tel. Co.* 149 Wis. 338, 135 N. W. 848.

Counsel for the city greatly rely on a recent case to maintain their claim that the agreement to furnish free current has not been superseded by the public utility statute. *Oshkosh v. Eastern Wis. E. Co.* 172 Wis. 85, 178 N. W. 308. In that case the city of Oshkosh granted to a street railway company a franchise to extend its interurban electric railroad from the city of Fond du Lac into the city of Oshkosh. There was a provision in the ordinance by which the company was to pay the city $35,000 in annual payments of $1,000 each. The ordinance was duly accepted. The complaint alleged that the consideration for the payments was partial compensation for the wear and tear of bridges and streets resulting from the operation of the interurban cars. After *surrendering* its franchise the company claimed that this agreement had been superseded and that it was no longer bound to make the payments. When the franchise was granted and accepted, the statute, sec. 1863, provided that the consent of the common council should be given by ordinance and upon such terms and subject to such rules and regulations and the payment of such license fees as the common council might from time to time prescribe. The distinction between the *Oshkosh Case* and the present case seems to us very plain. In the former case there was a *franchise* duly authorized by statute, and it was held that an agreement to pay the compensation stated for the use and wear and tear of the streets and bridges was not superseded

by the indeterminate permit under sec. 1797*t*—3, Stats. The decision expressly recognized the binding effect of the *La Crosse Case* above cited, and pointed out the difference between the statute under which the La Crosse company was organized and the street railway statute. The opinion in the *Oshkosh Case* is based on former decisions of the court, including *Manitowoc v. Manitowoc & N. T. Co.* 145 Wis. 13, 129 N. W. 925. In the latter case the opinion by Mr. Justice BARNES, while discussing a statute authorizing the railroad commission to fix rates, held that when the commission acted to fix rates, if the rates should be changed by their order a former contract would be superseded.

It is our conclusion that the *Oshkosh Case* does not support the contention of appellant's counsel and that it does not modify the rule settled by such cases as the *La Crosse Case; Calumet S. Co. v. Chilton,* 148 Wis. 334, 135 N. W. 131; and *Kenosha v. Kenosha Home Tel. Co.* 149 Wis. 338, 135 N. W. 848.

Sec. 1797*m*—87, Stats., provides that cities shall have power to determine by contract, ordinance, or otherwise all terms and conditions, not inconsistent with secs. 1797*m*—1 to 1797*m*—109, inclusive, upon which such public utility may be permitted to occupy the streets. The section also provides for hearings by the commission as to the validity of such contracts or ordinances. Counsel for the city urge that under these provisions the common council could even now insert clauses in a franchise providing for free service. and that the company's mode of relief was to appeal to the railroad commission. We have already held that the contract contained in the ordinance of 1890 was invalid. It was not made valid by the section referred to. Moreover, it seems clear to us that a contract giving free service to a city is inconsistent with the provisions of the public utility act and therefore not protected by the section in question. The reasons for this have been so fully stated in *Kilbourn City v. Southern Wis. P. Co.* 149 Wis. 168, 180, 135 N. W.

499, the *La Crosse Case,* and the *Calumet Case* that they need not be repeated.

Counsel for the city also rely on sec. 1797*m*—91, which provides as follows:

". . . The furnishing by any public utility, of any product or service at the rates and upon the terms and conditions provided for in any existing contract executed prior to April 1, 1907, shall not constitute a discrimination within the meaning specified."

They claim that this section saves contracts executed prior to the passage of the utility act April 1, 1907, and cite *Superior v. Douglas Co. Tel. Co.* 141 Wis. 363, 122 N. W. 1023. The same question was raised in the *Kenosha Case,* above cited, in which the following language was used by Mr. Justice VINJE:

"That was a case where the city of Superior in its proprietary character entered into a contract for free telephones with an existing telephone company operating under a charter from the state. No attempt was made by the city to confer any franchise, or right to operate any telephone system, upon the telephone company. The city and the telephone company, prior to the passage of ch. 499, Laws 1907, entered into a contract—not a part of any franchise granted or attempted to be granted—whereby the telephone company, for a valuable consideration, agreed to maintain a certain number of free telephones in the city of Superior. The city had paid the consideration by permitting alterations to be made in its city hall and buildings as requested by the telephone company, and it was held that the passage of the public utility law did not affect the contract, since sec. 1797*m*—91 thereof expressly provided that 'the furnishing by any public utility, of any product or service at the rates and upon the terms and conditions provided for in any existing contract executed prior to April 1, 1907, shall not constitute a discrimination within the meaning specified.' It is obvious the case at bar does not come within the principle applied or the section referred to in the *Superior Case.*"

In the same manner the present case is distinguishable from the *Douglas County Case.* The ordinances relied on

in the instant case attempted to grant franchises and to barter the exercise of the police power for free current, and we hold that the section under consideration does not preserve such agreements as are relied on by appellant. They were not made by the city in its proprietary capacity and were without consideration.

It is argued by appellant that since the company accepted the ordinances relied on it cannot now be heard to claim that they were *ultra vires*. By its legislation the state has imposed new burdens upon companies of this character. When they became subject to the restrictions of the indeterminate permit they became entitled to its benefits. *Wis. T., L., H. & P. Co. v. Menasha,* 157 Wis. 1, 145 N. W. 231.

Second cause of action.

The ground upon which the trial judge decided the second cause of action is, if his conclusions were correct, sufficient for the decision in this court. His conclusions are not attacked by the appellant, and they are supported by reason and authority. Appellant's counsel have, however, devoted their brief entirely to the claim of invalidity of the contract in its inception, and respondent's counsel state that they desire a decision upon that question because the contract is still in operation and its validity must be determined at some time. For these reasons it seems best to pass upon the validity of the contract at this time. Although the judgment in this cause of action was for only $123.14, the questions raised are numerous and are as perplexing as if the amount involved were a million dollars. There are four objections made by appellant.

1. That the contract is contrary to that part of sec. 3, art. XI, of the constitution which requires that any municipal corporation incurring any indebtedness shall, before or at the time of doing so, provide for the collection of a direct annual tax sufficient to pay the interest on such debt as it falls due, and also to pay the principal within twenty years.

Appellant concedes that this provision does not apply to

expenditures for ordinary running expenses, including electricity for park lighting and the cost of maintaining the system, and debts payable within a year out of incomes and revenues; but construes the contract in question as requiring the city to pay for the system in any event, if terminated in two years by paying the investment cost at that time, and if never terminated, counsel say, it obligates the city to pay the total investment cost within about twenty-two years. It is urged that this violates the constitution in that no tax was levied for the purpose and that the period of payment of the principal is not limited to twenty years.

We do not think that counsel correctly interpret the contract or the facts in their claim that the contract requires the city to pay for the system in instalments over a period of years or otherwise. An examination of the contract shows that there is no express provision to that effect. The only foundation for appellant's interpretation seems to lie in the provision for a depreciation reserve and in an assumption that the rate prescribed for its computation is not established simply to cover depreciation as an operating expense; on the contrary, that it is so excessive as to amount to payments upon the capital cost, upon an instalment plan, made under the evasive title of a depreciation reserve. We see no other explanation for the statement of counsel, as the cost of property retired from service is to be deducted from the reserve, and while the reserve may prove more than sufficient therefor it may, on the other hand, prove inadequate. It may prove that the city could never acquire the system thereby, or it may prove to be of such amount that at a certain time the city would acquire the system without further payment but would then acquire it in a worn-out condition.

Doubtless a contract could be drawn in which a charge purporting to be for the expense of depreciation could be made so excessive as to amount in fact to a contract for instalment payments upon a capital investment with the intent

of evading constitutional or statutory provisions. But there is no proof in the record that the depreciation reserve provided for in the contract in question exceeds its legitimate limits. It does not appear excessive on its face. In the absence of proof that the charge is excessive for the true purposes of covering the expense of depreciation, we cannot assume that it is other than it purports to be or that it is a payment upon capital. It is possible, though we need not now decide it, that if the reserve provided should prove in the future to be more than adequate for depreciation the railroad commission could modify the rate to conform to the needs.

A charge for depreciation is a necessary and proper element of the cost of each year's service; it is in the nature of an expense of operation, or a running expense, in at least as true a sense as is interest on the investment, and provision should be made therefor out of current earnings. *Miles v. People's Tel. Co.* 166 Wis. 94, 163 N. W. 652; *Knoxville v. Knoxville W. Co.* 212 U. S. 1, 13, 29 Sup. Ct. 148. See *Hill v. Antigo W. Co.* 3 Wis. R. R. Comm. Rep. 623, 641; *State Journal P. Co. v. Madison G. & E. Co.* 4 Wis. R. R. Comm. Rep. 501, 559; *In re Jefferson M. E. L. & W. Plant,* 5 Wis. R. R. Comm. Rep. 555, 560; *In re Fennimore M. W. & L. Plant,* 12 Wis. R. R. Comm. Rep. 194, 200. This feature of the contract, therefore, really falls within the concession of appellant's counsel as to expenditures to which the provision of the constitution does not apply; and the soundness of the concession is abundantly supported by authority. *Stedman v. Berlin,* 97 Wis. 505, 73 N. W. 57; *Herman v. Oconto,* 110 Wis. 660, 672, 86 N. W. 681; *Vaughn v. Montreal,* 124 Wis. 302, 102 N. W. 561; *Connor v. Marshfield,* 128 Wis. 280, 293, 107 N. W. 639.

The case of *Earles v. Wells,* 94 Wis. 285, 68 N. W. 964, is clearly different, as there the city obligated itself to pay the *principal and interest* of the bonds issued to cover the cost of the water plant in the form of so-called "rentals," and at

the end of the period of the "lease" the plant was to become the property of the city forthwith.

Appellant's counsel cite the fact that the contract obliges the city to pay the difference between the investment cost and the accumulated depreciation reserve upon its terminating the contract. But by this the city incurred no obligation. The termination of the contract is entirely at the option of the city. The respondent has no power to terminate it and thus obligate the city to pay anything. No indebtedness can be incurred under this feature of the contract unless and until the city exercises its option to terminate it. *Stedman v. Berlin,* 97 Wis. 505, 73 N. W. 57. The franchise in *Connor v. Marshfield,* 128 Wis. 280, 107 N. W. 639, contained a similar provision which was apparently considered unobjectionable. See, also, *Burnham v. Milwaukee,* 98 Wis. 128, 73 N. W. 1018.

Having adopted this construction of the contract it becomes unnecessary to more than allude to the various other arguments urged by respondent on this feature of the case, namely: that there may be included in the charges for service which may be contracted for in advance a charge for the amortization over a period of years of the investment involved; that the city is not in a position to take advantage of a violation such as is alleged, on the ground that the constitutional provision is not for the city's protection, or that it related to an independent and collateral act which the city should have performed, but, failing therein, may be required to perform later; and that the contract creates no indebtedness within the meaning of the constitution, because the amount to be paid is not presently fixed, referring to *Janes v. Racine,* 155 Wis. 1, 143 N. W. 707.

2. The second objection made by appellant to the contract is that it violates sec. 22 of ch. VI*a* of the Milwaukee charter (1914), which prohibits the park commissioners from expending or contracting a liability for any sum in excess of the amount levied in any year for the park fund on account

of such fund. There is no proof that the amounts involved in the contract may exceed the limits thus prescribed by the charter. There is no need of examining this objection further.

3. The third objection of appellant to the contract is that it calls for an expenditure of more than $200 and that no competitive bids were asked. There are three features of the contract charge, distinguishable in character, to which this claim may be applied: first, the charges for the mere furnishing of electric current to the system; second, the charges to reimburse respondent for the cost of building and operating the special system itself; third, the payment to be made by appellant upon the termination of the contract, upon which title to the special system vests in the city. It does not clearly appear from appellant's brief which ones or whether all of these classes of expenditures require a contract let upon bids.

The provision of the charter relied on as requiring bidding follows:

"All work and the purchase of supplies or material, chargeable to any ward fund, or to any city fund, including incidental printing, when the cost thereof shall exceed the sum of $200, except street cleaning, shall be let by contract, to the lowest bidder . . .; and no indebtedness shall be incurred in excess of the amount herein limited without a formal contract, let to the lowest bidder, and all work done or supplies and material purchased, exceeding in cost $200, shall be done and purchased, when practicable, by said commissioner, by contract, which shall be let after due notice, inviting proposals, in the manner provided for the letting of contracts for the doing of public work. . . ." Sec. 16, ch. V, Milwaukee Charter (1914), under the caption "Department of Public Works."

It is asserted that this governs expenditures of the board of park commissioners, and sec. 16, ch. VI*a*, Milwaukee Charter (1914), is cited to this effect:

Assuming that the park board is bound by the quoted section, the question remains whether it would forbid their

entering into the contract in question without letting it upon bids. In so far as the expenditures come under the head of electric current furnished, appellant's contention is answered by *Hurley W. Co. v. Vaughn,* 115 Wis. 470, 476, 91 N. W. 971, and *Oconto E. Co. v. Peoples L. & M. Co.* 165 Wis. 467, 481, 161 N. W. 789. The words in the *Milwaukee* charter, "and the purchase of supplies or material," do not seem to make it any more applicable to such contracts than do the provisions under which these cases were decided, namely, in effect, that all contracts for work shall be let to the lowest bidder.

It seems clear that such provisions of charters are intended to apply to contracts where public policy requires that competition be had to obtain a reasonable charge for work performed for, or materials and the like supplied to, municipal corporations. With the passage of the public utility act our conclusion that bids are not required for utility service is further supported, for the spirit of that act is a recognition that competition is an inadequate regulator of the rates of public utilities, wherefore public control is substituted for competition. The rates for such services and the rate established by the contract in question are filed with the railroad commission under the act and are subject to action by it. To such expenditures this provision of the charter has no application.

Appellant urges that, even though no competition were possible for the furnishing of the current itself, nevertheless many firms could have undertaken to install the equipment in the park, and that charges for such installation therefore come within the provision of the charter. In so far as appellant's argument relates to the charge for reimbursing respondent for the cost of building and operating the special system, which we have here classed as the second feature of the contract charge, the principles we applied to the first feature of the charge seem still to apply. As we construe the contract, this part of the charge is to cover part of the ex-

penses of furnishing the service, namely, lighting the park, and the installation and operation of the special fixtures are incidental thereto. It is the lighting which is furnished to the city, and the installation is a necessary facility therefor. Though the park board might have chosen to install the equipment itself and buy the current alone, it has not done so. It has chosen to have the light furnished entirely by the company. The cost of the plant necessary to furnish the service thus becomes one of the expenses of the service rendered. Such service is not unusual. Probably the water company furnished the hydrants in *Hurley W. Co. v. Vaughn,* 115 Wis. 470, 91 N. W. 971, and quite certainly the electric company furnished the poles, wires, and lights for street lighting in *Oconto E. Co. v. Peoples L. & M. Co.* 165 Wis. 467, 161 N. W. 789, and in neither was it suggested that it altered the nature of the service or removed the contracts involved from the rule therein laid down.

By making the payment which we have classed as the third feature of the contract charge, namely, the payment upon termination of the contract, the city may get title to the special equipment and therein may more truly be considered as getting work or purchasing supplies or material within the intent of the charter provision. There are several answers, however, to appellant's objection to this feature of the contract charge. In the first place the purchase is entirely optional with the city. The city may never expend anything, nor acquire anything, under this provision of the contract. It does not now, therefore, and may never, violate the provision of the charter. Moreover, the purchase, if ever made, may or may not involve an expenditure of $200. The provision for payment on the termination of the contract may, it seems, be regarded as incidental to the service rendered, like the second feature of the charge, and as therefore falling within the cases cited. If the option be accepted, it may be for the purpose of abandoning the entire arrangement, not to acquire the installation. It may be

acquired merely to be superseded by a more modern method of lighting. The arrangement for this payment no doubt enables the city to get a lower rate for service than would otherwise be possible, and therein it is supplementary and incidental to the service contract. Moreover, in order to get the service the city may properly contract for installing the equipment. Upon the termination of the agreement the installation would become in large part useless unless the city acquired it. No calling for bids at that time could help the situation. Any arrangement other than that made might result in great economic loss which a call for bids could not remedy. As in the matter of furnishing service, the ultimate purchase of the equipment is taken out of the intent of the charter provision by the public utility act, for sub. 2, sec. 1797*m*—79, Stats., provides that a city may purchase any part of a utility's plant by agreement with the utility approved by the railroad commission. The method by which the purchase may be made under the agreement is specified in that act, and no provision is made for competitive bids.

It may be that in this cause of action the city should be estopped, as it claims the company is in the first cause of action, from questioning the validity of the contract. But we shall not discuss that here.

4. The fourth objection made by appellant to the validity of the contract is that it is not countersigned by the city comptroller nor approved by the city attorney as to form and execution, as it is alleged the city charter requires. The provision of the charter urged in appellant's brief as so requiring is sec. 13, ch. V, Milwaukee Charter (1914), which provides:

"All contracts entered into, and all public notices required by law to be given by the commissioner of public works of the city of *Milwaukee*, shall be countersigned by the comptroller of the said city, and shall have no force unless so countersigned. All contracts entered into by the said commissioner, and all bonds taken by him, shall be entered into

in the name of, and shall be executed to the city of *Milwaukee;* and all such bonds or contracts, when executed, shall be examined and approved, as to form and execution, by the city attorney."

It will be noted that the section, in terms, applies only to contracts entered into by the commissioner of public works, and it is in the chapter dealing with the duties of that officer. Ordinarily its operation would not be extended beyond his contracts. *Superior v. Norton,* 63 Fed. 357, 359. It is urged, however, that the provision applies to the park board by reason of the last clause of sec. 16, ch. VI*a,* of the charter, which reads as follows:

". . . and generally in regard to said parks and boulevards, the said board of park commissioners shall have and possess all powers and authority now by law conferred upon or possessed by the common council and board of public works of the city of *Milwaukee,* in respect to the public squares and places in said city."

Assuming that restrictions and methods of procedure imposed upon the commissioner of public works are imposed upon the park board along with the grant of the equivalent of his powers, nevertheless appellant's conclusion does not follow, for in respect to lighting the park board seems to get its powers by the reference to the powers and authority of the common council in said sec. 16, not by the reference to those of the commissioner of public works. The council, not the commissioner, has been given the power over lighting generally. Sub. 35, 35*a,* sec. 3, ch. IV, Milwaukee Charter (1914).

An objection presenting more difficulty is that raised at the oral argument on sec. 13, ch. III, Milwaukee Charter (1914), which reads as follows:

"He [the comptroller] shall examine all estimates of work to be done by the board of public works of the city, and countersign all contracts entered into by said board of public works, and all certificates of work given by them; and also all contracts made in behalf of the city; and no contract

entered into, or certificate issued against property shall be of any validity unless countersigned by the comptroller, except as otherwise expressly provided in this act."

Superior v. Norton, 63 Fed. 357, and *Lee v. Racine,* 64 Wis. 231, 25 N. W. 33, may be cited as lending weight to appellant's contention. The section comes from the chapter dealing in general with the powers and duties of the comptroller, *inter alia,* and, it may be argued, is of general application and therefore a limitation upon the park board as upon other officers of the city. The provision dates from the general revision of the charter in 1874. Sec. 13, subch. III, ch. 184, Laws 1874. The statutes creating the park board and establishing the general system under which it operates date from 1889 and 1891. Ch. 488, Laws 1889; ch. 179, Laws 1891. It is therefore evident that the legislature in passing sec. 13, subch. III, did not specifically have in mind contracts entered into by the park board. That section appears by its terms to have had specific reference to contracts entered into by the board of public works, and in this respect differs from the provision in *Superior v. Norton, supra,* but it is also made applicable to other contracts.

The comptroller appears to be primarily an accounting officer and an officer to aid the council in establishing the tax rate. He is to make a report to the council on expenses and a detailed estimate of revenue necessary to be raised (sec. 12, ch. III, of the charter); he is to examine estimates of work to be done by the board of public works (sec. 13); he is to report to the council on prospective special taxes to be levied by it (sec. 14); he is to report monthly to the council the amount of work done, or for which contracts have been entered into, chargeable to ward funds, general city fund, or other funds (sec. 15); he is to examine accounts of officers receiving moneys (sec. 16); and is to audit claims to be allowed by the council (sec. 17). The above are with special reference to powers granted to him prior to the time of the establishment of the park board.

In ch. V of the charter, dealing with the commissioner (board) of public works, the duties of the comptroller are further defined. He is to countersign the commissioner's contracts (sec. 13); the commissioner is deprived of power by contract or otherwise to exceed in doing any work the sum appropriated by the council for that work in such year (sec. 14), and the commissioner is to deliver to the comptroller, with each contract to be countersigned, an estimate of the amount involved, and the comptroller is to keep a record of the estimates applicable to each fund and refuse to countersign any contract which will exceed the balance in the fund to which it is chargeable (sec. 15); and the comptroller is to have a like record of, and check on, expenditures to be made by the commissioner without formal contract (secs. 18, 19).

The general spirit of ch. VI*a* of the charter, however, governing the park board is to make that board, in the improvement, maintenance, and control of the parks, as independent as possible of all other officers and bodies. The board is given the full and exclusive power to govern, manage, control, and improve the parks, to appoint its employees and fix their salaries, and generally in regard to the parks to have all the powers of the council or board of public works in respect to public places in the city (secs. 16, 18, 18*a*); they are to report to the comptroller, it is true, the names of appointees and the salary allowed, and he is to audit claims against the board and they are to report to him claims allowed by them, and the board is to report to the council in each year on its transactions, expenditures, and the like (secs. 20, 22). It is significant that the board is given power to itself determine, within statutory limits, the tax to be levied for its work, which is merely certified to the council and comptroller by them, and which must thereupon be included by the council in the general tax levy for the year (sec. 21). It is made unlawful for the board to contract a liability in excess of the amount levied in any one year for

the park fund (sec. 22). It is given power to contract for the purchase of lands and to lease lands, upon order of the common council, without any mention of countersignature by the comptroller.

It will readily be seen that the park board of the city of *Milwaukee* stands on a very different footing from that of Superior as set out in *Superior v. Norton,* 63 Fed. 357. The Superior board had to seek its funds in the same manner and through the same channels as other city officers, such as the board of public works, while the *Milwaukee* board stands on an independent and superior ground in this respect.

While the comptroller has certain important duties in connection with the *Milwaukee* park board they seem principally to do with the auditing of claims and accounts. Sec. 13, ch. III, on the other hand, appears to bear principally upon the making up of the necessary tax levies. The park board, however, has complete power to determine its own tax levy, and in view of this fact and the other features of the charter reviewed it seems that sec. 13, ch. III, was not intended by the legislature to apply to contracts of a body such as the park board which was later created.

By the Court.—Judgment affirmed.

SCHAAP, Respondent, vs. WOLF and another, Appellants.

January 13—February 8, 1921.

Statute of frauds: Sale of standing timber: Modification of written contract by oral agreement.

1. A contract for the sale of standing timber relates to an interest in land and comes within the statute of frauds (sec. 2302, Stats.).
2. Where a contract for the sale of standing timber required its removal by the buyer before a specified date unless the vendor continued to own the farm during the following winter, in which case the purchaser could remove the timber at such time, a parol modification of the contract, providing for removal of the timber during the following winter regardless

of whether the vendor continued as owner, is void under sec. 2302, Stats., since a contract within the statute of frauds cannot be validly changed as to a material condition by an oral agreement.

APPEAL from a judgment of the circuit court for Sheboygan county: MICHAEL KIRWAN, Circuit Judge. *Reversed.*

Action to recover damages for refusal to permit plaintiff to enter certain lands and cut the standing timber thereon. December 18, 1916, the defendant *Wolf* owned the land and entered into a written unrecorded contract with the plaintiff permitting him to enter and cut all the standing timber thereon, all the timber to be removed before May 1, 1917. It further provided: "If *Mr. Wolf* still owns the farm next winter *Mr. Schaap* may have the privilege of removing timber at that time." On May 29, 1917, *Wolf* conveyed the land to the defendant Heise, and on August 29, 1917, he conveyed it to the defendant *Lindow*.

The jury found (1) that on April 2, 1917, *Wolf*, without consideration, orally agreed to allow plaintiff to cut and remove during the winter of 1917–1918 the balance of the timber then uncut; (2) that before *Wolf* conveyed to Heise he informed him of the written agreement but not of the oral one; (3) that they did not mutually agree that Heise should permit plaintiff to cut and remove the timber in the winter of 1917–1918; (4) that at the time of said conveyance it was not orally agreed between Heise and *Wolf* that it was made subject to the condition that plaintiff should have the right to cut and remove the timber in the winter of 1917–1918; (5) that *Lindow*, at and before the time he bought from Heise, had notice that *Wolf* had sold plaintiff all the timber; had notice of the written agreement and also of the oral agreement of April 2, 1917; (6) that plaintiff ceased cutting in the spring of 1917, relying upon the extension of time granted in the oral agreement; and (7) damages $225. The court dismissed the action as to the defendant Heise and entered judgment against the de-

fendants *Wolf* and *Lindow* for the damages found, with interest and costs, from which judgment they appealed.

M. C. Mead of Plymouth, for the appellant *Wolf*.

For the appellant *Lindow* there was a brief by *Geo. L. Mooney* of Plymouth and *Bowler & Bowler* of Sheboygan, and oral argument by *Mr. Mooney*.

For the respondent the cause was submitted on the brief of *H. J. Rooney* of Plymouth.

VINJE, J. The defendant *Wolf* contends that since the oral agreement of April 2, 1917, relates to an interest in land—standing timber,—it is void under the statute of frauds. Sec. 2302, Stats. The defendant *Lindow* makes the same defense, and further claims that since his grantor, Heise, was a *bona fide* purchaser for value and without notice of the oral extension of time for the removal of the timber, he took as good a title as Heise had and is therefore not liable, citing 2 Tiffany, Real Prop. 1095; *Simon v. Kaliske,* 1 Sweeny (N. Y.) 304; and *East v. Pugh,* 71 Iowa, 162, 32 N. W. 309. If the first of these respective claims is sustained it disposes of the case in favor of the appellants and alleged errors in procedure need not be discussed.

That a contract for the sale of standing timber relates to an interest in land and comes within the statute of frauds is well settled in this state (*Daniels v. Bailey,* 43 Wis. 566; *Seymour v. Cushway,* 100 Wis. 580, 590, 76 N. W. 769, and cases cited; *Huntington v. Burdeau,* 149 Wis. 263, 268, 135 N. W. 845, and cases cited), and is not contested by plaintiff. But he contends that though the contract is within the statute of frauds the oral agreement of April 2d was but an extension of time of performance, and under the rule in *Hirsch R. M. Co. v. Milwaukee & F. R. V. R. Co.* 165 Wis. 220, 161 N. W. 741, the defendants are estopped from setting up the statute as a defense. In that case the oral agreement related solely to the time of performance, without in any other respect modifying the written contract of sale of

goods. In the case at bar the written contract is modified by the oral agreement by striking out the clause therein stating, "If *Mr. Wolf* still owns the farm next winter *Mr. Schaap* may have the privilege of removing the timber at that time." It is conceded that *Mr. Wolf* did not own the farm next winter, but it is claimed that nevertheless plaintiff had a right to remove the timber. This can mean only one thing, namely, that the above quoted provision of the written contract was by the oral agreement eliminated and an absolute agreement made that, no matter who the owner was, plaintiff should have the right to remove the timber in the winter of 1917–1918. If this is not so, then the oral agreement added nothing to the written contract, for under that he had a right to remove the timber the next winter if *Wolf* owned the farm—no additional agreement was necessary to give him that right. In other words, it is claimed that a contract within the statute of frauds can by an oral agreement be validly changed as to a material condition therein. This is not the law. *Hanson v. Gunderson,* 95 Wis. 613, 70 N. W. 827; *Saveland v. Western Wis. R. Co.* 118 Wis. 267, 272, 95 N. W. 130, and cases cited. If that could be done it would practically nullify the statute of frauds, for if you had any contract in writing you could make an entirely different one by parol, using the written one as a basis of the change. The result would be that oral contracts preceded by a written one would be valid though quite different therefrom, while wholly oral contracts would be void. To hold that an original party to a written contract is held estopped to insist upon the time of performance thereof when he himself has caused the delay, as in the *Hirsch Case,* above cited, affects no condition of the written contract except the time of performance. Here one of the parties sought to be estopped was not a party to the original contract, but we do not rest the decision upon that ground and express no opinion as to how that might affect the question of estoppel in a proper case.

It follows as a matter of course that if the oral agreement is not binding upon *Wolf,* who made it, it cannot be binding upon *Lindow* even if he had notice of it. It will therefore not be necessary to pass upon the question of his taking good title through Heise, his grantor.

By the Court.—Judgment reversed as to appellants, and cause remanded with directions to dismiss the complaint as to them upon the merits.

TOWN OF MINERAL POINT, Respondent, vs. CITY OF MINERAL POINT, Appellant.

January 14—February 8, 1921.

Taxation: Review of action of assessing bodies: Jurisdiction of courts: Allocation of income taxes between municipalities: Review: Recovery of amount allocated to municipality: Procedure.

1. Courts, either at law or in equity, are powerless to give relief against the erroneous judgment of assessing bodies, except as they may be specially empowered by law to do so.
2. Sec. 1087*m*—17, Stats. 1917, does not contemplate a judicial review of the action of the state tax commission in allocating income taxes of a corporation to the various municipalities entitled thereto under sec. 1087*m*—22; and the statutes of this state confer upon the courts no power or authority to review such allocation.
3. Under sub. (6), sec. 1087*m*—22, Stats. 1917, where the plaintiff town applied to the tax commission and had the income tax of a corporation paid the defendant city allocated to it, the town securing the written approval of the commission for payment to it by the city of $6,248.58, and the claim of the town was filed with the city within a year, stating the facts, including the fact that the payment had been approved by the tax commission as required by the statute, the town, on refusal of the city to pay, had a good cause of action for the recovery of the amount, less the amounts paid the county and the state; the word "may," in the clause of the statute "such moneys may be paid to such town, city or village as is by law entitled to such tax upon such town, city or village making a satisfactory showing to the common council, town or village board, of such fact, within one year after the payment of the

income tax," meaning *must*, and the words "satisfactory showing" not being used in the sense in which they are ordinarily used in contracts. The town, however, has no right to a reallocation by the court or a review of alleged error of the tax commission or taxing officers.

APPEAL from an order of the county court of Iowa county: ALDRO JENKS, Judge. *Affirmed.*

Demurrer. Allocation of income tax to taxing districts.

It appears from the amended complaint that the Mineral Point Zinc Company operates a plant situated within the limits of the city of *Mineral Point* and partly within the town of *Mineral Point*. In 1918 the company paid to the city $48,065.71 as a tax upon its income for 1916 and that a part of the income was derived from business carried on and property located within the town of *Mineral Point*. Thereafter the town of *Mineral Point* secured the written approval of the tax commission for the payment of $6,248.58 as its portion of the income tax upon the Mineral Point Zinc Company on its income for 1916.

The town then filed its duly verified claim within one year from the payment of the tax to the city of *Mineral Point* with the common council of the city of *Mineral Point*, which claim was for $6,248.58 less the amount paid by the city to the state and county. The common council never passed upon this claim and no notice of action or nonaction upon said claim has ever been served upon the town of *Mineral Point*.

It further appears from the allegations of the amended complaint that the tax commission, in giving its written approval and consent, fixed the amount at $6,248.58 by reason of an error in computation due to the fact that the return for the year 1917 was used instead of the return for the year 1916, and it is alleged that if the allocation or apportionment of the tax had been made by the tax commission on the basis of the facts as they existed in the year 1916, the amount due the plaintiff town would be greatly in

excess of $6,248.58; that the plaintiff is unable to state the exact amount due because it has no means of ascertaining the facts upon which the apportionment must be made; that if it is necessary "to determine the actual value of those parts of the plant located respectively in the town of *Mineral Point* and in the city of *Mineral Point,* such valuation will involve a large number of parcels of real estate and a large number of permanent improvements, the value of which it is difficult to determine;" that the value of that part of the plant located in the city of *Mineral Point* is difficult to determine owing to the complexity of the assessment records for 1916 for the city of *Mineral Point,* which records cover many pages and consist of hundreds of items, including assessments of a large number of persons and of a large number of parcels of real estate, the location and identity of which is difficult to ascertain; that the Mineral Point Zinc Company is a large corporation doing a gross business of $2,500,000 to $3,000,000 a year; that the allocation of the income among the three plant units would involve an inspection of long, complicated accounts containing thousands of items; that it would be difficult to determine to which unit of the plant many of the items should be attributed; that all of the aforesaid units are furnished power by a single power plant of great value, and that it would be very difficult to determine what part of the value of the power plant should be properly credited to the respective units of the plant aforesaid. The prayer was for an accounting to determine the amount of the tax justly belonging to plaintiff and judgment therefor.

The defendant interposed a general demurrer to the amended complaint, which demurrer was overruled, and from the order overruling the demurrer this appeal is taken.

For the appellant there were briefs by *Thomas M. Priestley* of Mineral Point, attorney, and *Sanborn, Blake & Aberg* of Madison, of counsel; and the cause was argued orally by *Mr. John B. Sanborn* and *Mr. Priestley.*

For the respondent there was a brief by *Fiedler, Fiedler & Jackson* of Mineral Point, and oral argument by *Raymond T. Jackson* and *E. C. Fiedler.*

ROSENBERRY, J. Attention is called to the fact that we are not here dealing with the revaluation or reassessment of property for taxing purposes. It is admitted that the taxpayer has discharged its obligation to the state, and the controversy is solely between two taxing districts as to the allocation of the tax.

The right of the plaintiff to recover grows out of the provisions of the statutes then in force, as follows:

Sec. 1087*m*—22, Stats. 1917. "(6) Whenever any city, town or village shall have collected an income tax that under the income tax law ought not to have been collected by such city, town or village, but by the provisions of the income tax law should have been collected by another town, city or village, such moneys may be paid to such town, city or village as is by law entitled to such tax upon such town, city or village making a satisfactory showing to the common council, town or village board, of such fact, within one year after the payment of the income tax; provided, however, that no town or village board or common council shall refund any such moneys without the written approval of the assessor of incomes who made the assessment, or of the tax commission in the case of assessments made by it, specifying the defect in the assessment of [or] tax proceeding."

This section was amended by ch. 306, Laws 1919, which amendment is not material excepting as it may aid in the construction of the statute. In the absence of the statute, we are cited to no authority which would authorize a recovery under the common law in a like situation. Cases involving the distribution of assets where one municipality has been created out of another are not helpful for the reason that they depend upon the terms of the particular enabling act involved. While it is claimed by the plaintiff that it would have had a right of action against the defendant in the nature of an action for money had and received

at common law, no authorities are cited to support that proposition. The statute providing for the allocation of the tax is as follows:

"Section 1087*m*—22. The place at which the income tax herein provided for shall be assessed, levied and collected shall be determined as follows:

"(1) In their return for purposes of assessment persons deriving incomes from within and without the state, or from more than one political subdivision of the state, shall make a separate accounting of the income derived from without the state and from each political subdivision of the state in such form and manner as the tax commission may prescribe.

"(2) The entire taxable income of every person deriving income from within and without the state or from within different political subdivisions of the state, when such person resides within the state, shall be combined and aggregated for the purpose of determining the proper exemptions and proper rate of taxation. The taxable income so computed shall be assessed, and taxes at such rate shall be paid, in the several towns, cities and villages in proportion to the respective amounts of income derived from each, counting that part of the income derived from without the state when taxable as having been derived from the town, city or village in which said person resides."

It is provided by sec. 1087*m*—20:

"1. The state tax commission shall complete the assessment of income for each corporation, joint-stock company, and association on or before the fifteenth day of October in each year, and compute the tax thereon, and shall thereupon forthwith certify to each county clerk a statement of the assessment of each corporation, joint-stock company and association in his county and the amount of tax levied against each."

By the provisions of sec. 1087*m*—10 it is provided:

"The assessment of corporations, joint-stock companies and associations shall be made by the state tax commission, and the assessment of persons other than corporations, joint-stock companies and associations shall be by the county assessor of incomes."

It is provided by sub. 3, sec. 1087*m*—10, that every corporation shall furnish to the tax commission a true and accurate statement at such time and in such manner and form and setting forth such facts as said commission shall deem necessary to enforce the provisions of this act. There is no allegation in the complaint that the Zinc Company did not make a proper return as required by the income tax act.

The question arises, May the courts review the action of the tax commission in allocating the taxes of the Zinc Company to the various municipalities entitled thereto under the provisions of sec. 1087*m*—22, such allocation being a part of the assessment which the tax commission is required to make under the terms of the law, the right to such review not being given by the statute? There seems to be no provision for the review of the assessment upon the motion of a taxing municipality. While the language of sec. 1087*m*—17 is very broad, it apparently does not contemplate a review of the allocation between different taxing districts, but confers upon the board of review the power to increase or lessen the amount of any income assessed under the conditions there specified. We shall not construe the statute in this proceeding, as it does not appear from the allegations of the complaint that any effort was made by the aggrieved town to have the assessment made by the tax commission passed upon by the board of review. It appears from the allegations of the complaint that the tax commission proceeded upon its own initiative to correct the error with reference to the allocation of the tax assessed upon the income of 1916. No effort was made to obtain a review of the proceedings by which the tax commission endeavored to correct the mistake it had made. On the contrary, the aggrieved town filed a claim for the amount allocated to it by the tax commission and brought this action to enforce payment thereof, claiming, however, that a much greater amount is justly due to it. The granting of the relief sought

by the plaintiff would involve a reassessment, at least in part, of the income of the Zinc Company, in order that the alleged mistake of the tax commission might be corrected. No principle of law is better established than that courts, either at law or in equity, are powerless to give relief against the erroneous judgment of assessing bodies except as they may be specially empowered by law to do so. *Mills v. Gleason,* 11 Wis. 470; *Wis. Cent. R. Co. v. Ashland Co.* 81 Wis. 1, 50 N. W. 937; *State ex rel. Brown Co. v. Myers,* 52 Wis. 628, 9 N. W. 777; *State ex rel. Ellis v. Thorne,* 112 Wis. 81, 87 N. W. 797; 2 Cooley, Taxation (3d ed.) p. 1382 and cases cited. When the taxing authorities act within their jurisdiction and exercise their judgment in the manner prescribed by statute their determination is final and conclusive and their action may not be reviewed except in a manner prescribed by statute. Mere irregularities or errors of judgment afford no basis for invoking the exercise of judicial power. The remedies provided by statute are presumed to be adequate. *Ogden City v. Armstrong,* 168 U. S. 224, 18 Sup. Ct. 98. The statutes of this state confer upon the courts no power or authority to review, in the particular circumstances of this case, the action of the tax commission in allocating the tax.

The plaintiff therefore must recover, if at all, by virtue of the provisions of sub. (6), sec. 1087*m*—22. This brings us to the construction and application of that statute. The statute was evidently enacted so as to permit the tax commission to correct mistakes made by it in the allocation of income taxes between municipalities and to give the municipality which should by the provisions of the income tax law have received the tax the right to collect it. We think, therefore, the word "may" in the clause "such moneys may be paid to such town," etc., must be construed to mean "must," where the town entitled to receive the tax has complied with the provisions of the statute. The allegations of the complaint show that the plaintiff applied to the tax com-

mission and had the income of the Mineral Point Zinc Company allocated, with the result that it secured the written approval of the tax commission for the payment of $6,248.58 by the defendant. The claim was filed with the defendant within one year, stating the facts, including the fact that the payment had been approved by the tax commission as required by the statute. It is urged here that under the rule in *Lieberman v. Weil,* 141 Wis. 635, 124 N. W. 262, the court cannot say that the defendant city should have been satisfied with the showing made. We do not think the word "satisfactory," as used in sub. (6), was used in the sense in which it is ordinarily used in contracts relating to services or goods. We think that, as a matter of law, when by the showing made it satisfactorily appeared that the amount claimed is due and owing, that the claim had been filed within the time limited, that the tax commission had given its written approval and specified the defect in the assessment, in this case the allocation of the tax, the showing must be said to have been satisfactory in a legal sense. The allegations of the complaint show that such a showing was made, and the defendant thereby became obligated to pay the plaintiff the amount properly belonging to it under the provisions of the income tax law. The complaint states a good cause of action for the recovery of the sum of $6,248.58, less the amounts paid to county and state. It does not state a cause of action entitling the plaintiff to have the court make a re-allocation of the taxes or to correct the alleged error of the tax commission or to review the proceedings of the taxing officers, no such remedy being given the plaintiff by statute.

By the Court.—The order appealed from is affirmed. neither party to recover costs in this court, except the appellant shall pay the clerk's fees.

ESTATE OF GOODYEAR.

January 14—February 8, 1921.

Wills: Testamentary capacity: Undue influence: Witnesses: Credibility: Contradictory statements.

1. An order admitting a will to probate is affirmed notwithstanding one of the subscribing witnesses, testifying as to facts showing a proper execution of the will, admitted on cross-examination that he had made an affidavit before trial as to a different set of facts, where he testified there was a misunderstanding about the affidavit so presented to him and again reiterated his testimony, as the court evidently believed the witness and this court cannot say he was in error in his conclusion.
2. The evidence in this case, while conflicting, is *held* to support the conclusion of the court that there was testamentary capacity and that the will was not the result of undue influence.
3. A hypothetical question propounded by the contestants of a will to their expert having been answered in their favor, the refusal of their motion to have certain testimony included as a part of the question was harmless.

APPEAL from an order of the county court of Iowa county: ALDRO JENKS, Judge. *Affirmed.*

One Henry Goodyear executed his last will on August 22, 1916. It provided in substance for a bequest of $25 each to his two sisters and his half-brother, and the rest and residue was given and devised to a Mrs. Rachel Grouell of Neiber, Wyoming, who was the adopted daughter of the testator's sister, *Mrs. Frances E. Taylor.* The testator died January 26, 1920. Besides the two sisters and half-brother above mentioned he left him surviving a nephew and a niece. The two sisters, the nephew, and niece objected to the probate of the will and are the appellants here from the order admitting the will to probate.

For the appellants there was a brief by *Fiedler, Fiedler & Jackson* of Mineral Point, and oral argument by *E. C. Fiedler* and *Raymond T. Jackson.*

For the respondent there was a brief by *James E. O'Neill* of Dodgeville and *E. J. B. Schubring* of Madison, and oral argument by *Mr. A. R. Petersen* of Madison and *Mr. Schubring.*

ESCHWEILER, J. The order admitting the will to probate is assailed by the contestants on the grounds (1) that the same was not properly executed; (2) that the testator at the time of the execution was incompetent to execute it; (3) that the terms of such will were the result of undue influence. Error is also assigned as to a ruling on evidence.

The two witnesses to the will, on the hearing in the county court, testified on their direct examination as to all the facts and conditions necessary to establish the instrument propounded to be the last will of testator. No question is raised here as to the testimony of one of such contesting witnesses, he being the one who drafted the will. The other witness was confronted on cross-examination with an affidavit that he had made a short time before the trial in which statements appeared to the effect that he did not see the testator sign the will nor did he see the other attesting witness sign it; that they probably signed it before he came in; that he signed the paper but did not know at that time that it was a will; and that about a year after such signing by him the testator then first told him that the paper he had so witnessed was a will. He also admitted that he understood the affidavit at the time when he signed it. On the trial he stated that there was a misunderstanding about the affidavit so presented to him and again reiterated his testimony as to facts showing a proper execution of the instrument.

The trial court evidently believed the testimony of this witness as given on the trial, in spite of the apparent contradiction appearing from the affidavit. We cannot say that there was any error in the court's conclusion in this regard.

The conclusion of the trial court upon the record before

him that there was due and regular execution of the will is well supported by the facts and amply justified as to the law under the rulings of this court. *Will of Griffith,* 165 Wis. 601, 163 N. W. 138; *Will of Grant,* 149 Wis. 330, 334, 135 N. W. 833; *Will of Arneson,* 128 Wis. 112, 116, 107 N. W. 21; *Gillmor's Will,* 117 Wis. 302, 94 N. W. 32; *Will of O'Hagan,* 73 Wis. 78, 81, 40 N. W. 649, and other cases there cited.

Testimony was introduced on behalf of the contestants tending to prove that the deceased was very low in the scale of human mentality and morality. We consider that no useful purpose would be served by any detailed reference to such testimony. On the other hand, witnesses who had lived near deceased and known him for many years gave testimony of such a nature as to his mental condition and mode of life that it amply supports the conclusion of the trial court to the effect that at the time of the execution of the instrument in question the testator met the test required of one who is in law deemed competent to make a will. *Butler's Will,* 110 Wis. 70, 78, 85 N. W. 678; *Downing's Will,* 118 Wis. 581, 589, 95 N. W. 876; Rood, Wills, § 111.

In this record there is no evidence produced before the court which would have justified a finding that the will in question was the result of any undue influence exerted upon the testator inducing him to make the provision in the will giving substantially all of his property to one who was not related to him. It was his to give or withhold as he pleased. It was evidently his will that it should so go.

Complaint is made that certain testimony as to the behavior of testator on several occasions was excluded by the court on the contestants' motion to have such testimony included as parts of a hypothetical question put to one of the medical experts called by them. The exclusion of such matters of evidence, however, if erroneous, nevertheless was not prejudicial or reversible error in this case, for the hypothetical question was answered in contestants' favor.

The findings of the trial court were correct and must be upheld.

By the Court.—Order affirmed.

JONES, J., took no part.

GROESCHNER, Administratrix, Respondent, vs. JOHN GUND BREWING COMPANY, Appellant.

January 14—February 8, 1921.

Automobiles: Collision with motorcycle: Law of the road: Cutting corners: Negligence: Contributory negligence: Evidence: Verdict of coroner's jury: Instructions: Change of venue: Time of application: Disqualification of judge because of appearance of son as attorney in case.

1. A truck driver who crossed to the opposite side of the street on approaching a street intersection in order to cut the corner in turning into the intersecting street was guilty of a palpable violation of the law of the road.
2. In an action for the death of a motorcycle driver in a collision with a truck being driven on the wrong side of the street, the question of the contributory negligence of the driver of the motorcycle is for the jury.
3. The right to a change of venue is purely statutory and can be insisted upon only where the conditions prescribed by the statute authorizing the change exist; and the refusal of an application for a change of venue because of the prejudice of the trial judge, not made on or before the first day of the term as required by sec. 2625, Stats., is not erroneous even though the facts upon which the application was based were not known until after the commencement of the term.
4. The fact that a son of the presiding judge was one of the attorneys for the plaintiff in an action for the death of plaintiff's intestate did not disqualify the judge under sec. 2623, Stats., providing for a change of the place of trial where the judge is related to a party to the action, in the absence of evidence that the son was to be compensated by a contingent fee. [Whether the judge would be disqualified if the son were prosecuting the case upon a contingent fee, not decided.]
5. Whether the verdict of a coroner's jury is admissible for any purpose in an action for damages—a proposition generally

negatived by the authorities,—it was immaterial and inadmissible under the issues in this case.

6. The refusal of requested instructions which were fully and fairly covered by those given is not reversible error.

APPEAL from a judgment of the circuit court for La Crosse county: E. C. HIGBEE, Circuit Judge. *Affirmed.*

Action to recover damages for the death of plaintiff's intestate, who was a member of the police force of the city of La Crosse. At the time of his death he was a motorcycle officer. North Third street extends in a northerly and southerly direction, is brick-paved, forty-six feet wide from curb to curb, and a single street-car track occupies the center of the street. State street intersects said Third street at right angles, is also brick-paved, and is forty-two feet in width from curb to curb. This intersection is one of the busiest thoroughfares in the city.

On the 18th day of November, 1916, between the hours of 11 and 12 o'clock a. m., deceased was proceeding north on the right side of Third street on his motorcycle. About forty-two feet south of the intersection of Third and State streets he turned out to pass an ice wagon, proceeded northward across State street and collided with defendant's truck, in close proximity to the northeast corner of the intersection, was thrown under the truck and dragged some forty feet along State street before the truck was stopped.

The case was tried before a jury and a special verdict returned finding the driver of the defendant's truck guilty of negligence constituting the proximate cause of the injury, and acquitting the deceased of negligence. Upon this verdict judgment was rendered for the plaintiff. From the judgment so rendered the defendant brings this appeal.

For the appellant there was a brief by *George H. Gordon, Law & Gordon* of La Crosse, and oral argument by *George H. Gordon.*

Otto M. Schlabach, attorney, and *Jesse E. Higbee,* of counsel, both of La Crosse, for the respondent.

OWEN, J. It is first argued that the deceased was guilty of contributory negligence as a matter of law and that a verdict should have been directed in favor of the defendant. The deceased was proceeding north on the east side of Third street at a moderate rate of speed. The defendant's truck was going south on the west side of Third street, and as it approached the intersection of Third and State streets the driver thereof turned to the left for the evident purpose of cutting the corner as he turned east on State street, and the collision occurred within a few feet of the northeast corner of the intersection. In this the driver of the truck was guilty of a palpable violation of the law of the road. His negligence is unquestioned.

It is argued on the part of appellant that the deceased, if he had looked, could have seen the truck in front of him, and that his failure so to do constituted negligence as a matter of law. At the same time it is said that the intersection of Third and State streets is one of the busiest thoroughfares in the city of La Crosse. If this is true, manifestly the driver of the motorcycle was required to be sufficiently alert to avoid traffic of a character which he was required to anticipate. The deceased was not required to anticipate that he would encounter a truck on the wrong side of the street. At any rate, we are clear that he cannot be held guilty of negligence as a matter of law. It has been said by this court that questions of negligence arising out of automobile accidents are peculiarly for the jury, and that such questions will not be decided as a matter of law except under the clearest circumstances. *Shortle v. Sheill,* 172 Wis. 53, 176 N. W. 304. The case was properly submitted to the jury.

It is urged that the court erred in not granting the defendant's motion for a change of venue. This case was instituted by Otto M. Schlabach, Esq., as attorney for plaintiff. It was not reached for trial until about the fifteenth day of the term. The defendant then discovered that Jesse E. Higbee, Esq., a son of the presiding judge, had been em-

ployed to assist Mr. Schlabach in the trial of the plaintiff's case. Upon learning this the defendant filed an affidavit of prejudice, sworn to by the secretary of the company, in which the deponent stated that his ground for belief that defendant could not have a fair trial of said action on account of the prejudice of the presiding judge, was based upon the fact that Jesse E. Higbee, who had been retained to assist plaintiff's counsel, was the son of the presiding judge, and that the information that he was to assist plaintiff's counsel had come to deponent subsequent to the commencement of the term, for which reason he was not able to make the affidavit on or before the first day of the term. The trial judge denied the motion on the ground that the application was not made on or before the first day of the term.

The right to a change of venue is purely statutory and can be insisted upon only where the conditions prescribed by statute authorizing the change exist. Sec. 2625, Stats., requires that an application for a change of venue because of the prejudice of the trial judge must be made on or before the first day of the term when the judge named in the affidavit is the presiding judge in the judicial circuit in which the case is pending. The statute makes no exception in instances where information giving rise to the belief of prejudice on the part of the presiding judge come to the litigant after the beginning of the term. The terms of the statute are plain and definite and afford no occasion for judicial construction.

It is further contended that the judge was disqualified under the provisions of sec. 2623, Stats., which provides that the place of trial shall be changed when the judge is related to either party to the action. It is claimed that Jesse E. Higbee, Esq., had such an interest in the action as to constitute him a party thereto within the meaning of that section. This argument is based upon testimony given by plaintiff to the effect that her husband left no estate, and from this the conclusion is assumed that Jesse E. Higbee, Esq., must of necessity have an interest in the judgment. Whether an at-

torney who prosecutes a case upon a contingent fee has such an interest as constitutes him a party to the litigation within the meaning of this section we need not determine, for the reason that there is no evidence in the case from which it can be concluded that Jesse E. Higbee is so compensated or has such an interest in the judgment. This question was not raised in the court below, and no effort was made to show that Jesse E. Higbee was to be compensated for his services in any manner giving him an interest in the judgment. No error resulted from the refusal of the trial judge to change the place of trial.

The refusal of the court to receive in evidence the verdict of the coroner's jury, summoned to take an inquest on the view of intestate's dead body, is assigned as error. Whether the verdict of a coroner's jury is admissible for any purpose—a proposition negatived by the great weight of authority (*Hollister v. French,* 76 Cal. 649, 18 Pac. 855; *Rowe v. Such,* 134 Cal. 573, 66 Pac. 862; *Wasey v. Travelers' Ins. Co.* 126 Mich. 119, 85 N. W. 459; *Ætna L. Ins. Co. v. Milward,* 118 Ky. 716, 82 S. W. 364; *American Nat. Ins. Co. v. White,* 126 Ark. 483, 191 S. W. 25; *Goldschmidt v. Mut. L. Ins. Co.* 102 N. Y. 486, 7 N. E. 408; *State ex rel. Grice v. County Comm'rs,* 54 Md. 426; *Cox v. Royal Tribe,* 42 Oreg. 365, 71 Pac. 73),— it certainly was not admissible on any issue of this case. The questions here involved were those of the negligence of the respective parties. Concerning these questions the coroner's jury had nothing to do. The coroner's jury is summoned only when the district attorney, having notice of the death of any person within his county, has good reason to believe that murder or manslaughter has been committed. Sec. 4865, Stats. The jury is sworn to "inquire on behalf of this state when, in what manner and by what means the person whose body lies here dead came to his death." The verdict of the coroner's jury was that deceased came to his death by reason of an accident. It was not that either murder or manslaughter had been committed. The

question of the respective negligence of the deceased and the driver of the truck was not a legitimate subject of inquiry on the part of the coroner's jury any further than to ascertain whether the negligence of the driver of the truck was such as to constitute manslaughter. The driver of the truck was not charged with gross negligence in this case, consequently the issues involved here were entirely foreign to the subject before the coroner's jury, and its verdict was clearly immaterial.

Error is also assigned because of the refusal of the circuit judge to charge the jury as requested by the defendant. We have compared the requests with the charge as given, from which it appears that the court in its charge to the jury covered fairly and fully all of the points involved in the requests made by the appellant, from which it follows that reversible error did not result from the refusal of the judge to charge the jury as requested. We find no error justifying a reversal of the judgment.

By the Court.—Judgment affirmed.

OGODZISKI, Respondent, vs. GARA and others, Appellants.

January 14—February 8, 1921.

Assault and battery: Interruption of religious service: Question for jury: Removal of persons claimed to be causing disturbance: Use of excessive force: Burden of proof as to degree of force used: Evidence: Wealth of defendants: Punitive damages: Testimony of physician as to patient's history of ailment: Curing error committed in trial: Prejudicial remarks of counsel.

1. In an action by a church organist against the pastor of a church and others for injuries sustained by his wife when she was removed from the organ loft after he had been discharged from his employment, he and his wife refusing to leave the church on demand of the pastor until he was paid what was owing to him, the question whether he and his wife on the occasion in question were guilty of molesting and interrupt-

ing a religious service when they declined to leave the organ loft of the church on request of the pastor is for the jury.

2. The evidence showing the manner of the removal of the wife from the organ loft when she and her husband refused to leave not harmonizing, and the alleged injuries the treatment is claimed to have caused her permitting of different inferences, the question whether or not defendants used excessive force in evicting her from the organ loft is for the jury.
3. Where plaintiff charged an assault and the excessive use of force in the removal of his wife, and defendants contended that what they did was lawful and that they used no more force than was necessary, instructions placing the burden of proof on defendants to show that they used only reasonable force, instead of on plaintiff to show that they used unreasonable force, are erroneous and prejudicial.
4. Where a doctor visited the wife at the request of attorneys and prescribed for her, he could testify that he took the history of her ailment that she gave him into consideration but could not testify to the facts she so stated, except as to facts describing the existence of pain.
5. Communications sent by the defendant pastor to the wife, apparently pertaining to matters concerning the relationship of plaintiff and his wife as parishioners, organist, and members of the choir, were incompetent; and this court seriously questions whether the court's instruction to the jury that such evidence was improperly received and that they must disregard it cured the error in admitting it.
6. Where two or more defendants are sued jointly for punitive damages arising out of a tort, evidence as to the wealth of the defendants is not competent. *McAllister v. Kimberly-Clark Co.* 169 Wis. 473, followed.
7. Remarks of plaintiff's counsel in summing up the case to the jury to the effect that all the witnesses for the defense were communicants of the Catholic church, blindly subservient to their priest, against whose instructions they would not think of testifying, are prejudicial, and were not cured by the mere suggestion of the court to disregard them.

APPEAL from a judgment of the county court of Trempealeau county: RANDOLPH A. RICHARDS, Judge. *Reversed.*

This action was brought by the plaintiff to recover damages based upon a claim of assault and battery upon his wife, Mary Ogodziski. Plaintiff and his wife came to the village of Independence, Wisconsin, from Philadelphia on July 1, 1919. From July 1, 1919, until August 31, 1919,

plaintiff acted as organist in the Polish Catholic church of which defendant *Gara* is pastor, and plaintiff's wife sang in the choir. On the morning of August 31, 1919, after a disturbance, plaintiff's wife was evicted from the church by defendants *Marsolek* and *Skroch* by order of defendant *Gara*. Plaintiff claims that up to the time of this eviction his wife had been a strong, healthy woman; that on August 31, 1919, she was nineteen years of age and had been for several months pregnant with child; that the defendants wilfully and maliciously and without cause or provocation assaulted her, bruising and beating her; that by reason of this assault she suffered a miscarriage; that ever since she has been confined to her bed, her health impaired and her mind permanently affected. Damages were demanded by the plaintiff in the sum of $10,000. Defendants' answer asserts that *Adam* and Mary Ogodziski had voluntarily associated themselves as members of the congregation and as such were bound by the jurisdiction of the officers of such church and by the rules and regulations of the church and canon law; that on the morning in question they conducted themselves in a disorderly manner that required and justified their eviction from the church; that defendants *Marsolek* and *Skroch* as officers of the church evicted Mary Ogodziski solely so that the religious services interrupted by her might proceed; that in so doing defendants acted in discharge of their official duties and used towards her no force other than was reasonably necessary to perform their duty; that if in an effort to resist the exercise of the lawful orders of the church she sustained an injury, the same was of her own infliction and without fault of the defendants.

The case was tried before the court and a jury. The jury rendered a general verdict, finding for the plaintiff, and awarded plaintiff the sum of $3,000 as compensatory damages. Judgment was entered for plaintiff against the defendants jointly and severally in the sum of $3,000 and costs. This is an appeal from such judgment.

Jesse E. Higbee of La Crosse, of counsel, and *John Kulig* of Independence and *Ole J. Eggum* of Whitehall, attorneys, for the appellants.

For the respondent there was a brief by *Cowie & Hale* of La Crosse and *John A. Markham* of Independence, and oral argument by *Mr. R. S. Cowie, Mr. Quincy H. Hale,* and *Mr. Markham.*

SIEBECKER, C. J. It is contended by the defendants that the court erred in refusing to hold as a matter of law that the plaintiff and his wife, on the occasion in question, were guilty of molesting and interrupting a religious service when they declined to leave the organ loft of the church at the request of the *Rev. Gara,* who was in charge of the services. It appears that plaintiff and his wife refused to turn over the keys to the organ when *Rev. Gara* requested them to do so on Saturday, the day preceding the alleged assault. This request by *Rev. Gara* was made for the purpose of permitting one Volski, an organist, to play on the organ preliminary to negotiating for his engagement as organist of the church in plaintiff's place. The evidence shows that plaintiff had been engaged as organist for the church from the first Sunday in July and that he had not been discharged from this engagement. The by-laws of the church provide that the organist cannot be discharged without the consent of the bishop. At 8 o'clock mass on the Sunday morning of August 31st plaintiff and his wife appeared and occupied the organ bench for the purpose of furnishing the organ music and participating in the choir service. *Rev. Gara* came to the organ balcony and requested them to leave the organ bench so that Volski might play the organ; this they refused to do unless plaintiff then and there received full compensation for his services as organist. The interview resulted in their staying at the organ. No music was furnished for the 8 o'clock service. The next service was a high mass service at 10 o'clock. At the appointed time

plaintiff, his wife, and their little child were again present occupying the organ bench. *Rev. Gara* again came to the organ balcony and requested them to leave the bench and organ balcony. They again refused unless they were paid in full for plaintiff's services; whereupon one of the church trustees tendered plaintiff a check in payment of what the trustees considered due him. This plaintiff refused to accept upon the ground that it was insufficient and he refused to vacate the organ bench. *Rev. Gara* then directed them to leave the place, and upon their refusal to do so called upon the trustees present to remove them. They did not remove them. Plaintiff and his wife persisted in remaining in their places at the organ and with the choir, whereupon *Rev. Gara* called upon defendant *Marsolek* as church marshal and the defendant *Skroch* to remove plaintiff's wife, who had taken the more active and aggressive stand against *Rev. Gara's* requests and directions to leave the organ balcony. *Marsolek* and *Skroch* took hold of plaintiff's wife and forced her to the stairway leading from the balcony to the church floor, where others interfered and she was released. She returned to the balcony. The evidence is not without conflict as to what took place between *Rev. Gara* and plaintiff's wife on the occasion of the 10 o'clock service and as to who took the aggressive in the colloquy and as to the acts and conduct of the respective parties. As stated, plaintiff had not been discharged from service. That *Rev. Gara* did not desire his presence was known to plaintiff and his wife, but their presence under the circumstances cannot be held in law to be an unlawful act. It appears they did nothing to interrupt the religious service before *Rev. Gara* appeared in the balcony and that they were ready and willing to proceed with the organ and choir music in the usual manner. *Rev. Gara's* presence at the organ and his demands that they leave led to the verbal altercation and the forcible removal of plaintiff's wife. The facts and circumstances disclosed by the evidence are not sufficiently clear and free from conflict to determine

as a matter of law that plaintiff and his wife were guilty of causing the disturbance of the religious service and to authorize the wife's forcible removal from the church. We think the court properly submitted this issue to the jury for determination.

The court submitted to the jury the inquiry whether or not the defendants used an excessive and unreasonable amount of force in evicting plaintiff's wife from the organ balcony. The evidence showing the manner of her removal does not harmonize, and the alleged injuries this treatment is claimed to have caused her permit of different inferences and hence must be resolved by the jury. It is further contended that the overwhelming preponderance of the evidence established that plaintiff's wife did not have a miscarriage as is claimed by her. She and plaintiff testify positively to a state of facts which, if true, tend to support her claim. Her ill health following this assault is a condition, in the opinion of experts, that may have been caused by a miscarriage. In their opinion her forcible removal by defendants might so affect her as to produce miscarriage. In view of these consequences and the positive evidence of plaintiff and defendant on this subject, this issue of fact was properly submitted to the jury.

It is also claimed that the court committed prejudicial error in its instruction to the jury on the burden of proof. The court directed the jury as follows:

"In order for the plaintiff to recover in this action, the burden is upon him to satisfy and convince you, by a fair preponderance or greater weight of evidence, that his wife, Mary Ogodziski, conducted herself in a proper and orderly manner at said church meeting and was not the cause of the disturbances which arose in the balcony of said church meeting on the day in question; and if you are further satisfied and convinced by the fair preponderance or greater weight of evidence that the defendants were not so justified in evicting said Mary Ogodziski, then her eviction by force was an assault and battery for which the defendants must answer."

The court further instructed:

"The burden of proof is upon the defendants to satisfy and convince you, by the fair preponderance or greater weight of evidence, that the defendants were so justified in evicting Mary Ogodziski, *and that no more force was used than was reasonably necessary* in doing so, and if you are so satisfied and convinced, then plaintiff is *not entitled* to recover and your verdict must be for the defendants."

These instructions do not harmonize, but the effect of them is clearly to put the burden of proof upon defendants that they were justified in evicting plaintiff's wife from the organ balcony and that they used no more force than was reasonably necessary to remove her.

It is strenuously urged that this instruction states the rule of burden of proof correctly. This claim is based on the case of *Monson v. Lewis,* 123 Wis. 583, 101 N. W. 1094. That case turned upon the fact whether or not plaintiff or defendant was in the rightful possession of a scraper when the blow was struck for which damages were claimed by plaintiff. It is there declared that in an assault and battery, where the blow and the damages it caused are admitted, it devolved upon defendant to show that the assault was justifiable. We have no such state of admitted facts in this case. Here the assault and the excessive use of force upon plaintiff's wife as charged in the complaint are denied by the defendants. It is their contention that what they did was lawfully done upon direction of *Rev. Gara,* who was in charge of the church service and had the right to maintain order, and that they used no more force in removing plaintiff's wife from the balcony than was necessary. The issue thus presented required that plaintiff show, in order to establish his cause of action, that he and his wife did not disturb the church service, and if the jury found they did disturb such service then the burden was on him to show that defendants used an excessive amount of force in evicting her from the church on account of such unlawful disturbance. The in-

structions above quoted erroneously placed the burden on the defendants instead of the plaintiff. The effect of such error necessarily misled the jury, and in a hotly contested case like this one necessarily prejudiced the defendants in their rights. We cannot say upon the record that this error did not materially affect the verdict.

The defendants excepted to a number of other instructions given. These exceptions are called to our attention, but the grounds of prejudice asserted respecting them amount to no more than a criticism in phraseology and suggestions that defendants' request for instructions on the same point should have been substituted. We do not find the exceptions of sufficient importance to review them here.

It is contended that the court erred in admitting improper and immaterial evidence. It is urged that Dr. Thompson testified to the condition of plaintiff's wife when he visited her at the request of the attorneys in the latter part of September, 1919. The doctor prescribed for her. This made it proper to state that he took such history of her ailment as she gave him into consideration. But he cannot testify to the facts she so stated, excepting those facts describing existing symptoms of pain. We do not regard his testimony as shown by the record to be prejudicial in its nature and import. It is claimed by plaintiff that *Rev. Gara* sent communications to plaintiff's wife. Whether or not such alleged communications arose out of their controversy respecting plaintiff's services as organist is not clear. It is claimed by defendants that no such communications were sent. It is not shown that anything of an improper nature was communicated, nor do the facts and circumstances permit of such an inference. The trial court became convinced before the case was submitted to the jury that this was not competent evidence and instructed them that it was improperly received, and that they must disregard and treat it as though not received. The court did all it could to cure the error, but we seriously question that the mischief done by receiving it

could thus be cured. Of course this error will not be committed on a retrial.

Evidence of defendants' wealth was admitted on the question of punitory damages claimed by the plaintiff. In a case where two or more defendants are sued jointly for damages arising out of a tort, evidence of defendants' wealth is not competent. *McAllister v. Kimberly-Clark Co.* 169 Wis. 473, 173 N. W. 216. On this point we refer to the case of Mary Ogodziski against these same defendants arising out of the transaction involved in this case and decided herewith (*post*, p. 380, 181 N. W. 231).

Exception is taken to the remarks of plaintiff's counsel in summing up the case to the jury. The following is reported as a part of the exceptioned remarks: "By this claimed injury to the mother, the little child of the plaintiff [then in court] must go through life without the loving care and attention of a mother. . . ." The remarks further alleged that all witnesses for the defense were communicants of the Catholic church, who from earliest infancy had been taught blind obedience to the commands of its priests, and that each of them was in court as a witness for the defense upon the command, under the restraint, and subject to the influence of *Gara*, the priest, which they had felt from their cradles, and not one of them would think of testifying differently than as their priest had commanded; that all the powers of the Catholic church had been asserted to defeat the rights of the plaintiff and justice at the trial.

It requires no comment to show that the facts asserted in this summing up are not justified by the record. The effect of such comment was necessarily prejudicial when made to a jury composed of Protestants. It is common knowledge that the religious emotions are easily aroused, and that when aroused to the prejudice of a party the reason readily yields to such prejudice and naturally prevents a jury from acting deliberately and fairly upon the issues they must determine. We are compelled to hold that these remarks of counsel were

prejudicial and that the mere suggestion by the court to disregard them was wholly ineffectual to remove the prejudice engendered by them, under the facts and circumstances in this case. These remarks constitute prejudicial error in the trial of the case.

Other alleged errors have been examined, but we do not deem it necessary to treat them. A new trial of the case must be had upon the foregoing considerations.

By the Court.—The judgment appealed from is reversed, and the cause remanded with direction to grant a new trial.

OGODZISKI, Respondent, vs. GARA and others, Appellants.

January 14—February 8, 1921.

Assault and battery: Damages: Punitive damages in actions to enforce a joint liability: Instructions.

1. In an action to enforce a joint liability for assault against two or more defendants, testimony as to the wealth of one is inadmissible as affecting the amount of punitory damages assessed against all.
2. In a woman's action for assault and battery committed by the pastor of the church in which plaintiff's husband was organist, an instruction that plaintiff was entitled to recover such damages as would compensate her for physical pain and mental suffering endured in the past and which "she *may* have to endure in the future" was erroneous, and should have been "which she is *reasonably certain* to endure in the future."
3. The expression in the charge, "You must be satisfied to a reasonable *extent*," should have been, "You must be satisfied to a reasonable *certainty*." The charge "She is *entitled* to damages for the indignity," referring to punitory damages, should have been, "You *may* assess damages for the indignity," etc.; and the expression, "The amount of such damages [punitory] is *governed* by the wealth of the party," should have been, "The wealth of the party is an element to be considered in assessing punitory damages."

APPEAL from a judgment of the county court of Trempealeau county: HANS A. ANDERSON, Judge. *Reversed.*

Action to recover damages for an alleged assault growing out of the same acts complained of in the case of the husband, Adam Ogodziski, against the same defendants, decided herewith (*ante,* p. 371, 181 N. W. 227). In this case the jury returned a verdict assessing plaintiff's compensatory damages at $4,000 and her punitory damages at $4,000. From a judgment for the above sums and costs entered in favor of the plaintiff the defendants appealed.

Jesse E. Higbee of La Crosse, of counsel, and *John Kulig* of Independence and *Ole J. Eggum* of Whitehall, attorneys. for the appellants.

For the respondent there was a brief by *Cowie & Hale* of La Crosse and *John A. Markham* of Independence, and oral argument by *Mr. R. S. Cowie, Mr. Quincy H. Hale,* and *Mr. Markham.*

VINJE, J. The principal questions raised by the appeal herein are also raised in the case of the husband against the same defendants (*ante,* p. 371, 181 N. W. 227), and their treatment in that case by the Chief Justice will be considered applicable to this case.

Since the jury in this case found punitory damages it will become necessary to consider defendants' claim that it was error to receive testimony as to their wealth. We have recently had occasion to hold that in the case of two or more defendants the reception of such testimony is error on the ground that evidence as to the financial ability of one affects the amount of punitory damages assessed against all, and hence, since each one is liable for the whole judgment, he may be unjustly mulcted in damages because of the wealth of a codefendant, though he himself may be a poor man. See *McAllister v. Kimberly-Clark Co.* 169 Wis. 473, 476, 173 N. W. 216, and cases cited. We see no reason to change the rule there adopted. The reception of such testimony was prejudicial error.

Since there must be a new trial in this case also for reasons

stated in the case of the husband, we deem it proper to briefly refer to some errors in the charge to the jury to the end that they may not recur in the next trial if one be had. The court instructed the jury: "She is entitled to recover such damages as will compensate for the physical pain and mental suffering she has endured in the past and which she *may* have to endure in the future." This should have been, which she is *reasonably certain* to endure in the future. The expression "you must be satisfied to a reasonable *extent*" should have been, you must be satisfied to a reasonable *certainty*. The charge "she is *entitled* to damages for the indignity," referring to punitory damages, should have been, you *may* assess damages for the indignity, etc.; and the expression "the amount of such damages (punitory) is *governed* by the wealth of the party" should have been, the wealth of the party is an element to be considered in assessing punitory damages. It is not necessary to determine whether or not the errors here briefly alluded to are prejudicial. The prejudicial error as to the burden of proof is in this case also as well as in the husband's case, and that together with others herein treated require a reversal of the judgment.

By the Court.—Judgment reversed, and cause remanded for a new trial.

CHESS & WYMOND COMPANY, Respondent, vs. LA CROSSE BOX COMPANY, Appellant.

January 14—February 8, 1921.

Sales: Defects in quality: Notice to seller: Single or several contracts: Construction by parties: Breach: Failure to pay for quantity of goods received: Remedy of seller.

1. Under sec. 1684*t*—49, Stats., the buyer of kiln-dried rotary-cut gum veneer which accepted the material on delivery without giving the seller notice of defects in quality could not, when sued by the seller for the price, recover on its counterclaim for damages for defects in quality.

2. Where the parties to a contract of sale, effected by two separate orders, treated the matter of the time for shipment of the goods as if covered by a single contract, their construction will be followed and the contract will be treated as single. *Ambler v. Sinaiko,* 168 Wis. 286, followed.
3. A renunciation by a party of the terms of a contract of sale is a breach of contract which justifies the opposite party in treating the contract as broken and rescinding it at his election.
4. Under sec. 1684*t*—45, Stats., where the buyer of gum veneer not only refused payment, but proposed to hold moneys then in its hands belonging to the seller as security for the further performance of its contract, which constituted a clear departure from the contract and amounted to an announcement that the buyer had declined to carry it out, the seller was justified in its refusal further to perform.

APPEAL from a judgment of the circuit court for La Crosse county: E. C. HIGBEE, Circuit Judge. *Affirmed.*

Breach of contract. On August 17, 1917, one John L. Moore, a broker, of Jackson, Mississippi, sent the defendant quotations on twenty-six cars of kiln-dried rotary-cut gum veneer of different sizes and dimensions, price to be $40 per M. f. o. b. cars La Crosse. On August 30th the defendant sent to Moore the following order:

"You may enter our order as follows:
3-16"—16" wide—48"-60" long—3 cars.
1-4" —16" wide—40"-60" long—2 cars.
1-8" —16" wide—48"-60" long—1 car.
"If these cars prove satisfactory as to quality and service, we will be pleased to send you the balance of the order. Shipments to start at once. Cut-downs not to exceed 10%.
"Yours truly,
"LA CROSSE BOX CO.
"A. R. Scott, President."

Moore placed this order with the plaintiff, who in the meantime had opened correspondence with the defendant looking to a direct sale. By letter dated September 11, 1917, the defendant accepted plaintiff's proposition for five cars. The plaintiff did not receive the order given by defendant to Moore until after it had commenced corre-

spondence with the defendant in respect to a sale direct, and in reply to defendant's letter of September 11th the plaintiff wrote defendant as follows, under date of September 15, 1917:

"Beg to advise that since first taking this matter up with you we have received an order from you for six cars of veneer through Mr. John L. Moore of Jackson, Miss. We will make all possible speed in getting this out (both orders), but just now we are slightly handicapped by the fact that we are putting in some new machinery, but will do our best."

Four cars covered by the specifications of the first order were shipped and received, the last one being received February 26, 1918. The amount due for the car, deducting freight, was $393.16. The plaintiff shipped and the defendant received two cars of material to apply on the five-car contract, the second car being invoiced November 17, 1917. On January 17, 1918, the plaintiff wrote the defendant asking for a remittance of $1,002.95, open account, then over sixty days old. On January 29, 1918, the plaintiff wrote the defendant as follows:

"Upon examination of our books this morning we find that you owe us $2,825.94. We must insist that this account be paid. If we do not hear from you in the next four or five days we will take the liberty of drawing on you at sight."

On February 7th the plaintiff advised the defendant that it had drawn a sight draft for $2,825.94. On February 20th the draft was returned unpaid. On March 4th the National Bank of La Crosse forwarded to the plaintiff a draft on defendant's account for $2,390.70, with this statement:

"There is a balance of $393.16 due on the last car and this amount the *La Crosse Box Company* is prepared to pay on arrival of another car on the contract still unfulfilled. They claim there are several more cars due and are taking this means of making sure that you ship all the remaining cars contracted for."

On March 16th the plaintiff wrote the bank disputing the right of the defendant to hold the money to secure the performance of the contract and advising that future shipments would be made only with draft attached to bill of lading. On March 22, 1918, the defendant wrote the plaintiff as follows:

"Will you please advise us when you expect to ship the remaining five cars that are still due us on our order?"

On March 26th, in reply to the letter of March 22d, the plaintiff wrote the defendant:

"We have nothing to say in regard to any more deliveries until you have paid our account in full."

The amount not having been paid, on April 22d the plaintiff wrote the defendant canceling the contract. On April 24th the defendant wrote the plaintiff that it would pay on the 15th day of May, with interest at the rate of eight per cent. per annum. There were further negotiations, the plaintiff endeavoring to secure payment, which was refused by the defendant, and the defendant urging shipments, which were not made by the plaintiff because of the defendant's refusal to pay.

This action was begun by the plaintiff to collect the sum of $393.16 with interest from January 3, 1918.

The defendant answered by way of counterclaim, alleged that the gum veneer was to be kiln dried in flat condition ready for immediate use, admitted the receipt of the six cars, admitted that the last car of material received was not paid for, alleged that the material received was not kiln dried, was wet, not in compliance with the contract, and unfit for the purpose for which it was purchased, alleged by way of counterclaim that it was put to an expense of $409.07 in preparing the material for use and in making it comply with the terms of the contract, and by way of second counterclaim claimed special damages by reason of defects

of boxes manufactured therefrom to the amount of $200, and for its third counterclaim alleged that it had been put to the expense of $1,800 in procuring the material not delivered in the open market, and asked for judgment of $2,409.07.

At the close of the testimony the court directed the jury to return a verdict for the plaintiff in the sum of $393.16, and judgment was entered for the plaintiff accordingly, from which the defendant appeals.

The cause was submitted for the appellant on the brief of *George H. Gordon, Law & Gordon* of La Crosse, and for the respondent on that of *McConnell & Schweizer* of La Crosse.

ROSENBERRY, J. The errors assigned by the defendant raise two questions:

First. Was there an acceptance by the defendant of the goods shipped by the plaintiff within the meaning of sec. 1684*t*—49, Stats., which released the plaintiff, the seller, from liability?

Second. Did the refusal of the defendant to pay for the instalment due January 3, 1918, amount to a material breach, justifying the injured party in treating the whole contract as broken within the provisions of sub. 2, sec. 1684*t*—45, Stats.?

Detailed errors are assigned, which, under the disposition we make of the case, it is not necessary for us to consider.

It is undisputed that invoices were rendered with each of the shipments and that by the terms of such invoices payment was to be made within thirty days net. No objection being made to the time of payment as specified in the invoice, the trial court was of the opinion that it became, in effect, a part of the contract, and we shall so treat it. Otherwise the invoices would have been payable upon receipt. The only complaint made by the defendant prior to its refusal to pay for the car of material received January 3, 1918, was in its letter of January 23, 1918, as follows:

"Commencing in about sixty days and at the rate of one

car per week, we expect to take in thirty cars of 3-16 and ¼ inch gum and yellow pine veneer and we will be pleased to receive your quotations. The stock must be dried more thoroughly than what you have shipped us heretofore. Some of the stock that you shipped us before seemed to be as green as if it had just come from the log, and consequently it cost us considerable time and money to work. Quite a number of boxes were returned to us on account of the large cracks between the boards. Also some of the boxes were warped out of shape and were returned for that reason.

"We await your quotations on veneer that is in dry condition and ready to be used."

This letter did not apprise the plaintiff that the defendant expected to make any claim for damages on account of the quality of the material which it had received prior thereto. It appeared, without dispute, from the testimony of the officers of the defendant company that inspection of the material might have been made as it was received and that had an inspection been made the claimed defects in quality would have been disclosed. The trial court held that under the provisions of sec. 1684*t*—49, which provides "but, if, after acceptance of the goods, the buyer fails to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know, of such breach, the seller shall not be liable therefor," the defendant did not, within a reasonable time, give notice of its claim to the plaintiff. The holding of the trial court is fully warranted by the undisputed evidence. The first car was received by the defendant on November 14, 1917, more than two months prior to the time of the writing of the letter of January 23d. Although some complaint is made in the letter of January 23d, no claim for damages is made by reason of the defective condition of the material shipped by the plaintiff. There is nothing in the evidence to show that the defendant might not have discovered, by the exercise of ordinary diligence, the actual condition of the material accepted several weeks prior to January 18th. A buyer is certainly under obligations to use reasonable diligence in

ascertaining the condition of the goods which he has received. The property was in the possession of the buyer and subject to its unlimited control. No excuse is offered for the failure of the buyer to discover the condition of the material, and it knew, or ought to have known, of such condition long prior to January 23, 1918. The material to be delivered was kiln-dried rotary-cut gum veneer. The letter of January 23, 1918, is a complaint that the stock was not thoroughly dried, and nowhere in the letter is there an intimation that the defendant claimed a breach of any promise or warranty on the part of the plaintiff. The defendant, having accepted the material without notice of defect in quality, could not recover on its counterclaim for damages for defect in quality.

In this case there were two offers which were accepted by the letter of September 15th. While there were really two contracts, the transactions were treated by both parties as a single contract. In the letter of acceptance the plaintiff says: "We will make all possible speed to get this out," apparently referring to the material covered by the two offers which were being accepted by it. There was no demand by the defendant setting forth its right to performance of the contract under which it was not in default. The advice of the bank was that the defendant was holding the balance of $393.16 as a "means of making sure that you will ship all the remaining cars contracted for." In its letter of March 22d the defendant said: "Will you please advise us when you expect to ship the remaining five cars that are still due us on our order?" The parties having treated the matter, in that respect, as if covered by the single contract, they brought the matter squarely within *Ambler v. Sinaiko,* 168 Wis. 286, 170 N. W. 270.

Did the refusal by the defendant to pay for the car delivered January 3, 1918, coupled with the declaration of the defendant that it proposed to hold the unpaid balance as security for the further performance of the contract, amount

to a material breach justifying the plaintiff in treating the contract as broken under the provisions of sub. 2, sec. 1684*t*—45? By that section it is provided:

"Where there is a contract to sell goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it depends in each case on the terms of the contract and the circumstances of the case, whether the breach of contract is so material as to justify the injured party in refusing to proceed further and suing for damages for breach of the entire contract, or whether the breach is severable, giving rise to a claim for compensation, but not to a right to treat the whole contract as broken."

It was said in *Campbell & Cameron Co. v. Weisse,* 121 Wis. 491, 99 N. W. 340, that a party might insist upon full performance of a contract by having the quantity purchased delivered, though the party so insisting be in default as to payments for material delivered, upon the ground that the payment for such deliveries is not a condition precedent to the complete performance of the contract by the seller. In the *Campbell & Cameron Co. Case* there was a contract for the sale of bark, which was to be loaded at Pratt's Junction, measured and accepted at Sheboygan Falls, and paid for spot cash within ten days from receipt of cars. Between December 30, 1901, and January 13, 1902, the seller delivered eight carloads of bark, and a dispute arose as to the measurement of the bark, as a result of which the seller refused to deliver more, whereupon the buyer refused full payment on the shipments that had been made and received on the ground that the seller had breached its contract. It will be seen, therefore, that the general proposition there stated does not apply to a case where the seller is not in default and the buyer has refused to make a payment due under the terms of the contract.

Prior to the enactment of the uniform sales act the great

weight of authority in this country sustained the proposition that failure to pay for one instalment by the buyer excuses the seller from delivering the rest, and this generally without regard to the reason for the buyer's failure. 2 Williston, Contracts, § 867, and cases there cited; 32 L. R. A. N. S. note p. 2. The matter is thoroughly treated in 5 Page, Contracts, at §§ 3008–3022. A renunciation by one party of the terms of a contract of sale is, under all the authorities, a breach of the contract and justifies the opposite party in treating the contract as broken and rescinding and avoiding it at his election. *Murphy v. Sagola L. Co.* 125 Wis. 363, 103 N. W. 1113; 5 Page, Contracts, § 3013.

In this case we are not dealing with the mere inadvertence of the buyer to make payment for an instalment nor with a situation where payment is delayed by reason of some controversy as to quantity or quality, but with a straight-out refusal to pay in accordance with the terms of the contract. This, as was held in *Ambler v. Sinaiko*, 168 Wis. 286, 170 N. W. 270, constitutes, as a matter of law, a breach of the contract. This is true both under the uniform sales act and under the law as it stood prior to the passage of that act. While in a particular case, whether the breach by reason of the failure to deliver an instalment or to accept and pay for it is a material breach or not is generally a question for the jury (*E. I. Dupont de Nemours P. Co. v. United Z. & C. Co.* 85 N. J. Law, 416, 89 Atl. 992), where the conduct of the buyer amounts to a renunciation of the contract the seller may elect to treat it as a breach.

In this case the buyer not only refused payment, but proposed to hold the moneys then in his hands belonging to the plaintiff as security for the further performance of the contract. This constituted a clear departure from the contract and amounted, as was said in *Murphy v. Sagola L. Co.* 125 Wis. 363, 103 N. W. 1113, to an announcement that the buyer had declined to carry out the contract according to its terms and justified the plaintiff in its refusal to further

perform. *Norrington v. Wright,* 115 U. S. 188, 6 Sup. Ct. 12. See, also, *Dow C. Co. v. Detroit C. Works,* 208 Mich. 157, 175 N. W. 269.

The defendant having breached its contract and the plaintiff having elected to treat the contract as at an end, the defendant had no right to require further deliveries. It was therefore not entitled to recover on its counterclaim for failure to deliver.

By the Court.—Judgment affirmed.

MILWAUKEE BASKET COMPANY and another, Appellants, vs. WIECKI and another, Respondents.

January 15—February 8, 1921.

Workmen's compensation: Parents as dependents of minor child: Presumption: Burden of proof: Measure of dependency: Method of ascertainment: Contributions of minor to family earnings.

1. There is no presumption from the mere fact of family relationship that parents are partially dependent on an unmarried son nineteen years old within the meaning of the workmen's compensation act, and they have the burden of showing such dependency to a reasonable certainty by competent evidence.
2. Where members of a family consisting of the parents and six children contributed amounts aggregating $3,022 to the family earnings, of which deceased, an unmarried son nineteen years old, contributed $824, being $432 in excess of the amount used for his support, the industrial commission was warranted in finding that such son contributed the latter amount to his parents' "support" so as to entitle them to benefits allowable to partial dependents under sub. (4) (c), sec. 2394—9, Stats., based on his contribution, though $900 of the family earnings were paid on the purchase of a home. Justices VINJE and JONES dissent in so far as the opinion holds that the contributions of the minor which went into savings or investment are "support" within the meaning of the statute.
3. Where a minor contributes his earnings to the family funds, so much thereof as is actually needed and necessarily used for his individual care and support from the general family

purse should be deducted from his earnings in determining the amount of his contributions to the support of his dependents, under sub. (4) (c), sec. 2394—9, Stats., notwithstanding the parents' legal duty to support him.

APPEAL from a judgment of the circuit court for Dane county: F. RAY STEVENS, Circuit Judge. *Affirmed.*

One John Wiecki received an injury resulting in his death while in the employ of the *Milwaukee Basket Company*. His parents, *Francisca* and *August Wiecki,* made application for compensation under the workmen's compensation act.

Deceased was nineteen years of age and unmarried at the time of the accident, January 15, 1919. The *Commission* found that the deceased and five other children had been living as members of the family during the year preceding the accident. The two youngest, aged thirteen and six, attended school. Four of the children and the father were working. The earnings during the preceding year were as follows:

August Wiecki, the father	$1,081 45
John, deceased	824 33
Max	570 07
Frances	341 60
Anna	791 76
	$3,609 21
The family also received as rent from a son-in-law for a portion of the homestead in which they lived	36 00
	$3,645 21

It is conceded that it was error on the part of the *Commission* to assume that the entire amount of Anna's earnings were contributed to the family, as it appears from the undisputed evidence that she in reality contributed but $169. Such difference, however, does not materially affect the question here to be decided.

A little more than a year before the death of John the

family had undertaken to purchase the home in which they lived. During the year they had paid on the indebtedness for this home the sum of $1,300, $400 of which had been borrowed from the son-in-law, leaving $900 which had been taken out of the earnings of the family.

The *Commission* determined that after deducting the $900 from the total earnings of the family the balance was the sum necessarily used for the support of the family. Assuming that the support of the two children at school together would be equal to the support of one wage-earner, an amount was then arrived at as the actual cost of the support of each member of the family, fixing such at about $400. Such an amount was deducted from the earnings contributed by the son John and the balance then left of $432 held by the *Commission* to be the amount contributed by John for the support of the family and the basis for the computation under sub. (4) (c), sec. 2394—9, Stats., and multiplied by four gave the amount of $1,728 fixed as the death benefit.

The appellants, the employer and insurer, brought an action for review in the circuit court for Dane county on the ground that the finding of the *Commission* upon the question of dependency is not supported by the evidence. From the judgment of the circuit court affirming the award of the *Commission* the plaintiffs have appealed.

For the appellants there were briefs by *Brown, Pradt & Genrich* of Wausau, and oral argument by *L. A. Pradt.*

For the respondents there was a brief by the *Attorney General* and *Winfield W. Gilman,* assistant attorney general, attorneys for the *Industrial Commission,* and *Schoetz, Williams & Anderson* of Milwaukee, attorneys for *Francisca* and *August Wiecki;* and the cause was argued orally by *Mr. Gilman.*

ESCHWEILER, J. The amount contributed by the deceased minor son John to his family with whom he lived

during the year preceding his death, even without having deducted therefrom the amount that was necessary for the actual cost of his support, was less than the $900 taken out of the family earnings and paid therefrom on the purchase of the home.

Sub. (4) (c), sec. 2394—9, Stats., being the section upon which the findings of the *Commission* rest, reads, so far as here material, as follows:

"(c) In case the deceased employee leaves no one wholly dependent upon him for support, but one or more persons partially dependent therefor, the death benefit shall not exceed four times the amount devoted by deceased, during the year immediately preceding his death, to the support of such dependents and shall be apportioned according to the percentage that the amount devoted by the deceased to the support of such person or persons, for the year immediately prior to the accident, bears to the average annual earnings of the deceased."

The appellants contend that the undisputed facts that, from the contributions made to the general family purse by all the working members of the family, there was taken out and used $900 for the specific purpose of paying for a home, and which sum was more than the total earnings of the deceased, conclusively negative the finding by the *Commission* of partial dependency of the parents upon the deceased son, under any reasonable construction to be given to the section above quoted. That where, as here, had there been no contributions by the deceased son to the family during the year preceding the death, there would have been nevertheless a surplus (disregarding the $900) over and above the amount that would have been actually expended for the care and support of the family, it must be held as a matter of law that such sum of $900, being in excess of the earnings of the deceased, was neither used nor needed for the support of the family and therefore there was not a case of partial dependency; that the surviving parents are not losers by reason of the son's death in respect to any dependency for support by them upon him.

The claimants have the burden of showing to a reasonable certainty from competent evidence that there was, at the time of the death, a partial dependency by them upon such deceased, there being no presumption in that regard in their favor from the mere fact of the family relationship. *Wis. D. Co. v. Industrial Comm.* 161 Wis. 42, 45, 152 N. W. 460.

Under present-day conditions there cannot be any question but that payments, to a reasonable extent at least, for the purpose of maintaining the roof which shelters the family, either in the shape of rent if it be not their own, or interest upon existing indebtedness on such home if it be theirs, and for repairs, insurance, or such like items, should be considered a part of the necessary support of the family within the meaning of the statute. It is so frankly conceded by appellants' counsel.

In this case, instead of renting, the family elected to purchase a home. By what must undoubtedly have been rigid economy, as is demonstrated by a momentary comparison between the number maintained and the amount from which such maintenance had to be taken, they set aside a very substantial part of such joint earnings for the purpose of thus securing a home.

It cannot well be questioned but that as to some at least of the $900 taken out of the joint family earnings there was a very proper basis for holding that there was a situation of partial dependency of the parents for their support upon the earnings of this son. The *Commission* was therefore justified in so finding, and such finding as affirmed by the circuit court certainly cannot be disturbed.

The *Commission*, having this situation before it, arrived at its conclusion that the amount devoted by the deceased to the support of his parents during the year prior to the accident was the whole amount of his earnings paid over to his family less the amount actually needed to pay for his care and support. We cannot say, in view of all the circumstances presented in this record, that such conclusion was unwarranted. Similar holdings have been sustained

in other courts. *State ex rel. Fleckenstein B. Co. v. District Court,* 134 Minn. 324, 159 N. W. 755; *Day v. Sioux Falls F. Co.* (S. Dak.) 177 N. W. 816.

We find nothing inconsistent with the result here reached in the cases relied upon by appellants, *Dazy v. Apponaug Co.* 36 R. I. 81, 89 Atl. 160, and *Rhode Island B. & I. Works v. Industrial Comm.* 287 Ill. 648, 122 N. E. 830.

It is suggested in respondents' brief by the assistant attorney general that it is desirable to have the question now decided whether or not the *Industrial Commission,* in determining matters of dependency such as here involved, should deduct from the total contributions to the family by the injured person an amount of money equal to that which was actually used or needed for his individual support during the year in question before it fixes the amount that should be held to have been contributed to the support of the dependents. It being contended that where the injured employee was, as in this case, a minor and living with his parents, there was the corresponding relative duty of support of such minor by the parent regardless of whether or not the parent exercised his legal right to receive the wages of such minor, therefore there is no warrant for deducting such sum, as the parent would have had to pay just as much, the son not earning or contributing, as when earning and contributing. Although the question as presented is not necessary for a disposition of this case, nevertheless we feel that our views upon it may be stated now.

We are of the opinion that where, as here, a minor contributes his earnings to his family with whom he resides, so much thereof as is actually needed and necessarily used for his individual care and support from the general family purse is to be treated as a sum used for his individual support rather than as a contribution by him of the same amount to the support of his dependents under the statute above quoted.

We think the rule and the reason are well stated in the case of *Moll v. City Bakery,* 199 Mich. 670, 165 N. W. 649.

By the Court.—Judgment affirmed.

VINJE, J. (*dissenting*). I am unable to concur in the view that that part of contributions to the family fund that go into savings or investment can be said to be for support. In this case the whole family earned during the test year $3,022.45, placing Anna's contribution at $169, which it is conceded it should be. Out of this sum $900 were saved and invested, leaving $2,122.45 used for family support for the year. The deceased contributed $432 net to the family fund, exclusive of his own support. It should be held that a proportionate part of his contribution went into savings or investment. Such proportionate part would be $128.06, and this sum should have been deducted from his net contribution to the family fund and the balance only held to have been for support.

Under the principle announced by the court, a father who earns $3,000 for the test year, spends $2,000 for the support of his family, and invests $1,000 is held to be dependent upon a son who contributes $400 to the family fund for the year. I cannot believe that it was the legislative intent that a father should be permitted to swell his investment account at the expense of an employer of his son, or at the public expense, if it instead of the employer ultimately bears the burden. Neither in popular nor in technical language does the word "support" connote a meaning common to either "investment" or "savings," and judicial construction should not change its meaning.

I am authorized to state that Mr. Justice JONES concurs in this dissent.

WISCONSIN-MINNESOTA LIGHT & POWER COMPANY, Respondent, vs. JOHNSON, imp., Appellant.

January 15—February 8, 1921.

Workmen's compensation: Parents as dependents of adult child.

Where an adult son living with his parents paid them his board and lodging and contributed nothing else to the family purse excepting presents, made payments amounting to $400 upon a home for the family, as he had agreed to do if his father would purchase one, and paid $45 for furniture to be used in the home, his parents are not entitled, under the workmen's compensation act—sub. (4) (c), sec. 2394—9, Stats.,—to an award for his death.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

One Henry Johnson was killed April 23, 1919, while in the employment of the respondent. Claim for compensation was made by *John Johnson,* his father. The industrial commission held that there was a case of partial dependency and allowed a death benefit in favor of the father of four times the amount found to have been contributed by the son. Henry was twenty-five years of age at the time of the accident and for more than a year preceding his death had lived at home with his father, mother, and a married sister with her two children. Henry paid $25 a month for his board. Under claimant's testimony that was just about the cost of his board.

Within the year preceding his death and on the suggestion of Henry and upon his stating that he would pay for it, the father disposed of the old house in which they had been theretofore living and purchased a new home. The son then drew $200 from the savings bank in which he kept his funds and gave a check for that amount to his mother and it was applied directly on the first payment for the house. Subsequently and during the same year he in the same

manner advanced another $200. He also bought and paid for furniture in the amount of $45 which was placed in the house. He also gave his mother two items of $10 each, but one was in the nature of a Christmas present and the other to enable her to visit another member of the family, and both of these items were disregarded in the findings of the industrial commission. The father was able, out of his earnings, to make small payments upon the house.

Upon appeal to the circuit court the award was set aside. From the judgment so directing the claimant has appealed.

A. C. Larson of Eau Claire, for the appellant.

For the respondent there was a brief by *Linderman & Ramsdell* of Eau Claire, and oral argument by *G. O. Linderman.*

For the defendant *Industrial Commission* there was a brief by the *Attorney General* and *Winfield W. Gilman,* assistant attorney general, and oral argument by *Mr. Gilman.*

ESCHWEILER, J. In this case an adult son, living with his parents and paying them for his board and lodging a regular amount fairly equivalent to its cost, contributed nothing in excess of such amount to the family purse. The father had no legal control over the wages of the son. Two contributions of $200 each were made by the son for the avowed and designated purpose of the purchase of a home. Neither of such payments ever became a part of the general family fund, nor were they intended to be used for any other purpose than the particular one to which they were in fact applied.

We feel compelled to hold that under the facts in this case the $445 paid by the son was not paid by him for the support of his parents within the meaning of sub. (4) (c), sec. 2394—9, Stats., under which the claim is made. The facts here are so manifestly different from those appearing

in the case of *Milwaukee Basket Co. v. Wiecki,* decided herewith (*ante,* p. 391, 181 N. W. 308), that extended discussion is unnecessary.

It follows that the judgment of the circuit court should be affirmed.

By the Court.—Judgment affirmed.

CITY OF MILWAUKEE, Respondent, vs. MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Appellant.

September 25, 1920—March 8, 1921.

Street railways: Distinction between street and interurban railways: Jurisdiction of courts: Questions relating to franchises: Unlawful use of city streets: Injunction at request of city: Estoppel: Use of streets without franchise: Continuing trespass: Prescription: Eminent domain: Compensation to adjoining owners: Highways: Purpose of dedication.

1. Neither the railroad commission, whose function is to establish reasonable street-car rates, nor the courts can interfere with the granting of a street railway franchise, which is a legislative act; but whether the company needs a further franchise than it has to carry on its business within the limits of a given city is a judicial question within the jurisdiction of the courts.
2. Though the right to prevent the unlawful exercise of a franchise by a street railway company rests solely with the state, to be asserted in *quo warranto,* a city has authority in its governmental capacity and is charged with the duty to maintain the streets for lawful travel, and as an incident of that duty can have their unlawful use by a street railway company prevented by injunction. In its proprietary capacity as the owner of lots a city can, like any other owner, sue for injunction to restrain the placing of an additional burden on the streets abutting its lots without compensation.
3. The fact that a city has acquiesced for more than twenty years in the use of its streets by a street railway company does not estop the city from asserting its right to prevent such use.
4. A city seeking to prevent the use of streets for interurban railway traffic cannot, in its proprietary capacity as owner of lots

abutting on the streets, resort to condemnation, in the absence of a franchise for interurban traffic.

5. The use of city streets by a street railway company without a franchise permitting the particular use is a continuing trespass on the streets, which may be restrained by injunction.

6. As against the city in its governmental capacity or as against the public, a continuing trespass on city streets by a street railway company using the streets for a purpose not permitted by its franchise cannot ripen into a right.

7. This court has held (a) that city streets are subject to ordinary surface street railway service without compensation to the owners of abutting lands; (b) that country highways or streets outside of city limits are not subject to ordinary street railway service without extra compensation to the owners of abutting lands who thereby suffer serious impairment to their right of access to such lands; and (c) that neither city streets nor country highways are subject to interurban railway service without compensation to the owners of abutting lands.

8. The purpose of dedicating streets and highways for public use is to permit travel thereover, and the means by which travel is effected is secondary to the primary purpose and may change from time to time with new inventions and changed conditions.

9. Urban surface street car passenger service is the transportation of passengers in suitable cars over the streets of a city operated so as to permit them to enter and leave the cars at reasonable intervals, regardless of the initial point from which the car or passenger comes or the point to which they are destined, the criterion being the character of the service rendered by the cars while on the city streets.

10. Interurban railway passenger traffic as to a given city is the transportation between it and other cities or municipalities of passengers without thereby rendering reasonable or the prescribed street-car service in such city.

11. The operation upon an urban surface street railway by the owner of the franchise therefor of cars reasonably suitable for street-car service, and which give street-car service in such manner as the railroad commission may prescribe, or, in the absence of regulations by the commission, give reasonable street-car service, does not subject the adjacent property within the city limits to an additional servitude, though such cars may start from or be destined for points outside the city limits or be used in strictly interurban service outside of the city limits; and the operation of such cars within the city limits does not require any franchise additional to the urban surface street-car franchise. *Younkin v. Milwaukee L., H. & T. Co.* 120 Wis. 477, overruled.

12. Where the street railway company had a franchise for carrying freight to a certain street, which was the city limits, it had the right to continue carrying freight to such street after the city limits were extended.

APPEAL from a judgment of the circuit court for Milwaukee county: E. T. FAIRCHILD, Circuit Judge. *Reversed.*

Action by the city of *Milwaukee* in its governmental capacity and also in its proprietary capacity as owner of a large number of lots abutting upon streets over which the defendant operates its street railway system to enjoin the defendant, which has no interurban franchise in the city of *Milwaukee,* from carrying upon its street railway system in the city of Milwaukee passengers brought from or carried to points outside of the corporate limits of the city. The trial court defined an interurban passenger as one whose passage starts at a point within the city for a destination outside of the city limits or starts from a point outside of the city limits and comes to a point within the city limits. Based upon this definition of an interurban passenger, he found that interurban service was rendered wherever an interurban passenger was carried and found within what specific points on each of defendant's lines within the city interurban service was rendered. As conclusions of law the court held (a) that the city in its governmental capacity was entitled to an injunction restraining the defendant from operating cars carrying interurban passengers between the points and over the portions of the line described in the findings of fact; (b) that the city in its capacity as owner of the properties described in the findings of fact was entitled to an injunction restraining the defendant from operating cars carrying interurban passengers in front of such properties; and (c) the city is entitled to an injunction restraining the carriage of freight across the city limits as found in finding number 2. From a judgment entered accordingly the defendant appealed.

For the appellant there were briefs by *Van Dyke, Shaw,*

Muskat & Van Dyke, attorneys, and *Miller, Mack & Fairchild,* of counsel, all of Milwaukee; and the cause was argued orally by *James D. Shaw* and *Edwin S. Mack.*

Clifton Williams, city attorney, for the respondent.

The following opinion was filed December 14, 1920:

VINJE, J. Defendant's contention that the court has no jurisdiction of the action because it necessarily prevents the enforcement of an order of the railroad commission is not tenable. It is the function of the railroad commission to establish reasonable street-car rates. It is not concerned with the question of whether or not the street car company has the requisite franchise to operate its cars. That is purely a judicial question. The granting of the franchise is a legislative act, which neither the railroad commission nor the courts can interfere with. Whether defendant needs a further franchise than it has to carry on its business within the limits of *Milwaukee* is the main question for determination in this case, and it is a judicial question within the jurisdiction of the trial court.

Defendant also claims that the city in its governmental capacity has no power to maintain this action, because it is said the city has no rights or duties with respect to the unlawful exercise of franchise, since such right rests solely with the state to be asserted in an action of *quo warranto.* That is true. But this is not an action to annul a franchise. The city is charged with the duty of maintaining streets for lawful travel, and as an incident of that duty it has the right to inquire if a certain kind of travel is lawful, and if not to have it prohibited by injunction. It claims defendant has no franchise for interurban traffic and that it is carrying on such traffic on the streets of the city. Streets are dedicated for lawful travel, and a city has the right to see that the purpose of the dedication is not departed from by the unlawful use of streets.

As the owner of a large number of lots abutting upon streets on which defendant's tracks are laid, the city in its

proprietary capacity may maintain this action to prohibit any burden additional to a lawful street use being imposed upon them without compensation. *Chicago & N. W. R. Co. v. Milwaukee, R. & K. E. R. Co.* 95 Wis. 561, 70 N. W. 678; *Younkin v. Milwaukee L., H. & T. Co.* 112 Wis. 15, 87 N. W. 861; *Beloit, D. L. & J. R. Co. v. Macloon,* 136 Wis. 218, 116 N. W. 897; *Schuster v. Milwaukee E. R. & L. Co.* 142 Wis. 578, 126 N. W. 26. For, as was said in *Milwaukee v. Milwaukee,* 12 Wis. 93, 101, "In its character of a political power, or local subdivision of government, it is a public corporation, but in its character of owner of property it is a private corporation, possessing the same rights, duties, and privileges as any other." See, also, *Eau Claire Dells Imp. Co. v. Eau Claire,* 172 Wis. 240, 179 N. W. 2.

In view of what has been held it cannot be said that the city's case is without equity if it can establish an unlawful use of its streets either as to its governmental or proprietary capacity. The fact that it has for a considerable period of time, upwards of twenty years the court found, acquiesced in such use, if any, does not estop it from now asserting its claim. *Wilbur L. Co. v. Milwaukee L., H. & T. Co.* 134 Wis. 352, 114 N. W. 813; *Schuster v. Milwaukee E. R. & L. Co.* 142 Wis. 578, 126 N. W. 26. In its proprietary capacity it could not resort to condemnation in the absence of a franchise for interurban traffic. *Beloit, D. L. & J. R. Co. v. Macloon,* 136 Wis. 218, 116 N. W. 897. The use of the streets by the defendant without a franchise, where one is needed, constitutes a continuing trespass. *Ibid.* As against the city in its governmental capacity, or as against the public, the continuing trespass, if any, has not ripened into a right.

Before we consider the question of whether or not the defendant has made a use of the city's streets not warranted by its franchise, it is desirable to state briefly what our court has held upon this and related questions. It has held:

(a) That city streets are subject to ordinary surface

street railway service without compensation to the owners of abutting lands. *Hobart v. Milwaukee City R. Co.* 27 Wis. 194; *Chicago & N. W. R. Co. v. Milwaukee, R. & K. E. R. Co.* 95 Wis. 561, 70 N. W. 678; *La Crosse City R. Co. v. Higbee,* 107 Wis. 389, 83 N. W. 701; *Beloit, D. L. & J. R. Co. v. Macloon,* 136 Wis. 218, 116 N. W. 897. (b) That country highways or streets outside of city limits are not subject to ordinary surface street railway service without extra compensation to the owners of abutting lands who thereby suffer serious impairment to their access thereto. *Zehren v. Milwaukee E. R. & L. Co.* 99 Wis. 83, 74 N. W. 538. (c) That neither city streets nor country highways are subject to interurban surface railway service without compensation to the owners of abutting lands. *Chicago & N. W. R. Co. v. Milwaukee, R. & K. E. R. Co.* 95 Wis. 561, 70 N. W. 678; *Younkin v. Milwaukee L., H. & T. Co.* 120 Wis. 477, 98 N. W. 215; *Beloit, D. L. & J. R. Co. v. Macloon,* 136 Wis. 218, 116 N. W. 897; *Schuster v. Milwaukee E. R. & L. Co.* 142 Wis. 578, 126 N. W. 26.

None of the cases define what constitutes passenger street railway service nor what constitutes passenger interurban railway service, though it is apparent that the additional burden must grow out of some difference in the service. In *Schuster v. Milwaukee E. R. & L. Co.* 142 Wis. 578, 126 N. W. 26, it was found that the interurban cars were larger than street cars; that they usually ran at a greater speed and often in trains of two or more and stopped after reaching the city limits to discharge only interurban passengers, and had a terminal station for the discharge of most of their passengers. This constituted a substantial difference from ordinary street-car service, especially as to the discharge of passengers. In *Beloit, D. L. & J. R. Co. v. Macloon, supra,* the interurban road had not secured from the city council a right to use the street for interurban railway purposes but only for urban street railway purposes, and it was held that it could not condemn for interurban

uses. In *Younkin v. Milwaukee L., H. & T. Co.* 120 Wis. 477, 98 N. W. 215, decided in 1904, the interurban cars ran from Milwaukee through Waukesha and to Waukesha Beach, a distance of about three miles beyond Waukesha. The cars were held to render interurban service in Waukesha though they ran through the city as local cars and rendered the usual local street-car service. There is nothing to show they did not render such local service in a reasonably adequate and satisfactory manner. But the court reached the conclusion that, since they were in interurban service before they reached Waukesha and after they left it, they were in such service within the limits of Waukesha. In other words, the decision went upon the basis of the origin and destination of the cars rather than upon the character of the service they rendered while in Waukesha. The question presented is, Shall we adhere to that basis or shall we seek to define passenger street-car service and passenger interurban service upon a basis of difference in service? The latter seems to be not only the most logical but also the only criterion that will permit of a change in method from time to time as new inventions or uses spring into being.

Law is the rule of reason applied to existing conditions. Obviously, when conditions change there must be a corresponding change in the law, else it would cease to be a rule of reason and would become a mere arbitrary static rule. Law indicating, as it does, the just relations that obtain under given conditions, can be static only so long as the conditions to which it applies remain static. It does not prevent new conditions from arising, for if it did, and could, progress would be arrested. On the contrary, it aims to adjust relations to conditions as they exist when rights or obligations are claimed under them, and in proportion as it does that equitably it performs its true function. Whenever it arrests or clogs true progress it ceases to function truly. To do justice, then, under existing conditions, is its paramount office—all else, even the most venerable prece-

dents, must yield to that office. So much by way of an academic introduction to the legal solvent that must be applied to the question now before us.

In the development of every industry important changes take place from time to time. This is true of street-car and interurban service as well as of other industries. Changes have taken place in the size of rails used, in the power employed, in the size and weight of cars, in the rate of speed, in the frequency of stops, and in many other respects. First we had animal power, then cable cars, and now electric cars. We find much less difference within city limits between the ordinary interurban and street railway service than we did a few decades ago. The California court points this out, saying:

"There has recently come into existence a certain class of railroads, known as interurban roads, which are a sort of hybrid, having in some respects the characteristics of the ordinary railroad, and in others those of the street railroad. Within the limits of the cities which they enter they usually pass along the streets, and perform the ordinary functions of street railroads, stopping where desired to let passengers on or off, and serving the public need for local street travel. Outside the cities, on their way from one city or town to another, they frequently travel upon a roadway obtained from private persons, not upon a public road, and stop, as in case of ordinary railroads, only at stations established by them for that purpose." *San Francisco & S. M. E. Co. v. Scott,* 142 Cal. 222, 75 Pac. 575.

The purpose of dedicating streets and highways for public use is to permit travel thereover. The means by which travel is effected is secondary, the purpose is primary. *La Crosse City R. Co. v. Higbee,* 107 Wis. 389, 83 N. W. 701. The means may change from time to time, dependent upon man's inventive genius. Not so long ago animal power was the exclusive means of travel whether used to propel the animal alone, as in walking, or in transporting passengers by means of an animal-drawn vehicle. Naturally, therefore, it was

considered that streets were dedicated to the use of walking and driving only—limiting driving to animal power. With the advent of steam and electricity came other power for street travel use. Since the primary use of streets is travel—the transportation of persons and goods thereover,—any method of accomplishing that purpose in a reasonably safe, convenient, practical, and effective way constitutes a legitimate street use.

The growth of large cities has taxed the inventiveness of man to the utmost to solve the question of passenger transportation therein, and especially in their congested business centers. We now have surface, elevated, and subway tracks. We have local, limited, or express cars. They run singly, or more often in trains of considerable length. We thus see that man's necessities and his ability to meet those necessities have materially changed street travel as to method though the street purpose remains the same. The use of the streets is open to all who wish to travel thereon whether for business or pleasure, whether residents or nonresidents. It is to the interest of a city to make its streets convenient for the easy travel thereon of all who live within or visit it.

In view of the foregoing considerations, we hold that urban surface street-car passenger service is the transportation of passengers in suitable cars over the streets of a city operated so as to permit them to enter and leave the cars at reasonable intervals. The initial point from which the car or passenger comes or the point to which they are destined is immaterial. The criterion is the character of the service rendered by the car while on the city streets. If that is an ordinary or reasonable street-car service as to fitness of car, rate of speed, and frequency of stops for passengers to enter and leave, then while on the city streets such service is street-car service though the car may come from or enter interurban service on the same trip. In

Jeffers v. Annapolis (Md.) 68 Atl. 361, it was held that an electric railway is none the less a "street" railway within city limits, under ordinances authorizing it to use certain streets, though when it leaves the city it becomes an interurban railway. So held at the suit of an owner of an abutting lot within the city who sought compensation but was denied it. And in *State ex rel. Dennison v. Seattle R. & S. R. Co.* 64 Wash. 167, 116 Pac. 638, it was held that a railway company which performs the service of an ordinary street railroad in a city under a franchise granted by the city is, as to such service, a street railroad though it is also an interurban railroad engaged in carrying passengers beyond the limits of the city.

We further hold that, as to a given city, interurban railway passenger traffic is the transportation between it and other cities or municipalities of passengers without thereby rendering reasonable or the prescribed street-car service in such city. In interurban service the streets of the city are used for a purpose foreign to their dedication by being transformed into a right of way for a commercial railroad which does not render reasonable street service. Hence the additional burden upon abutting lands.

From the foregoing it follows that the operation upon an urban surface street railway by the owner of the franchise therefor of cars reasonably suitable for street-car service, and which give street-car service in such manner as the railroad commission may prescribe, or, in the absence of regulations by the commission, give reasonable street-car service, does not subject the adjacent property within the city limits to an additional servitude, though such cars may start from or be destined for points outside the city limits or be used in strictly interurban service outside of the city limits; and the operation of such cars within the city limits does not require any franchise additional to the urban surface street-car franchise.

Since we reach the conclusion that the trial court entertained an erroneous view as to what constitutes interurban service, it follows that conclusions of law (a) and (b) are also erroneous and that the case must be sent back for a new or further trial as to whether or not the defendant renders any interurban service within the city of *Milwaukee*, and, if so, on what lines and between what points. It is probable that from the evidence already taken that fact could be determined. But we think it just to the parties, in view of the difference between the trial court's conception of interurban service and this court's view thereof, to permit them to introduce such further testimony as they may desire, to the end that all the evidence applicable to the law as herein contained may be taken. We see no reason for disturbing the trial court's conclusion (c).

By the Court.—Judgment reversed, and cause remanded for further proceedings according to law.

The following opinion was filed March 8, 1921:

PER CURIAM. Our attention is called to the fact that defendant's Milwaukee-Waukesha line had a franchise for carrying freight east as far as Twenty-second avenue, which was formerly the city limits of Milwaukee. They have since been extended further west. In the opinion it was stated that we saw no reason for disturbing the trial court's conclusion (c), which was that the city is entitled to an injunction restraining the carriage of freight across the city limits as found in finding number 2. In view of the change in the city limits this conclusion will be construed to authorize the defendant to carry freight on its Milwaukee-Waukesha line as far east as Twenty-second avenue, the former city limits.

A motion for a rehearing was denied, without costs, on March 8, 1921.

STATE EX REL. BLAINE, Attorney General, vs. FAIRCHILD, Circuit Judge, and others.

September 25—December 14, 1920.

On a motion to quash an alternative writ of *mandamus* restraining the enforcement of the judgment of the court in the case of *Milwaukee v. Milwaukee E. R. & L. Co., ante,* p. 400, the decision in that case controls, and the motion to quash is denied.

ORIGINAL ACTION of *mandamus.*

J. J. Blaine, attorney general, and *M. B. Olbrich,* deputy attorney general, for relator.

Van Dyke, Shaw, Muskat & Van Dyke and *Miller, Mack & Fairchild,* all of Milwaukee, and *Clifton Williams,* city attorney, for defendants.

VINJE, J. *Mandamus* sued out of this court to restrain the circuit court and parties in the case of *City of Milwaukee v. Milwaukee Electric Railway & Light Company* from carrying into effect the judgment entered therein, and especially that part of it requiring passengers from outside of the city limits but within the single-fare zone, as established by the railroad commission, or passengers from the city going to some point in the single-fare zone outside the city, to pay an additional fare at the city limits. In view of the decision herewith rendered in the case of *City of Milwaukee v. Milwaukee Electric Railway & Light Co., ante,* p. 400, 180 N. W. 339, the petition is held to contain all the essential facts necessary to state a cause of action, and the city's motion to quash the alternative writ of *mandamus* is denied.

By the Court.—Motion to quash the alternative writ of *mandamus* is denied.

STATE EX REL. HEMMY, Respondent, vs. MILLER, Appellant.
STATE EX REL. PAUTSCH, Respondent, vs. LINDEMANN, Appellant.

October 20, 1920—March 8, 1921.

Corporations: Election of officers: Eligibility: Nonresident officers: Proxies: Lack of documentary stamps: Validity: Receipt by election officials: Liability: Rehearing on motion of court.

1. Where the by-laws of a mutual hail and cyclone insurance company required that a member be given a second notice by mail of delinquency in the payment of an assessment, a member in default was entitled to vote where it did not appear that the second notice had been given.
2. Where the articles of incorporation of a mutual hail and cyclone insurance company, after reciting who should be the first officers and directors, declared that each officer should reside at the place of the home office, while other sections declared that each director should be a *bona fide* resident of the state, one not residing at the place of the home office is ineligible to be an officer.

On rehearing:

3. This court has power, on its own motion, to order a rehearing although neither party moved therefor, and although the order was not made within thirty days after the original decision was filed, where the court ordered the record to be retained within sixty days after such decision was announced.
4. Although the federal revenue act of 1919 (U. S. Comp. Stats. Ann. Supp. 1919, § 6318*n*) provides for the retention in force of all laws relating to the assessment and collection of taxes, so far as applicable, the act of Congress of June 13, 1898, making certain unstamped instruments, including voting proxies, invalid, did not become a part of the revenue act of 1919 so as to forbid the voting of an unstamped proxy at a corporate election, since in the passage of the revenue act of 1914 these sections were incorporated in the bill passed by the House of Representatives but were eliminated by the Senate.
5. The presiding officers and inspectors of a corporate election were not justified in rejecting unstamped voting proxies on the ground that the reception of such ballots would subject them to a penalty under the revenue act of 1919 (U. S. Comp.

Stats. Ann. Supp. 1919, § 6318*k*), providing that whoever "accepts" any instrument, document, or paper without the full amount of tax thereon be duly paid is guilty of a misdemeanor and subject to a fine.

APPEALS from orders of the circuit court for Dodge county: CHESTER A. FOWLER, Judge. *Affirmed.*

The first action was brought by plaintiff to test the right and title of defendant to the office of director of the Wisconsin Farmers Mutual Hail and Cyclone Insurance Company, a Wisconsin corporation with principal offices at Juneau, Wisconsin.

The last annual meeting of this company was held at its offices November 3, 1919. At this time there was to be held an election of director of the company to succeed *T. P. Hemmy,* the plaintiff. Both plaintiff and defendant were candidates for the office, and the defendant was declared elected on the ballots taken at the meeting. Plaintiff contends that the defendant was not legally elected, but that nevertheless he entered into and usurped the office.

Defendant demurred to the complaint. The demurrer was heard and overruled by the circuit court. From the order overruling this demurrer appeal is taken.

The second action was brought to test the right and title of the appellant to the office of secretary of the same company.

At a meeting of the board of directors of the company in which *William F. Miller* participated as a director, *Ferd. Lindemann* was declared elected as secretary of the company. Plaintiff, who was secretary at the time, was also a candidate for the office. *William F. Miller* cast his vote in favor of the defendant. Defendant was elected by a majority of one vote. Plaintiff contends that defendant failed of election because *Miller's* vote was illegal; that the vote should have been declared a tie, and that the plaintiff would be entitled to the office until his successor was duly elected and qualified. He also contends that article 5 of the

articles of organization of the company provides that the officers of the company shall reside at the place of the home office, and that the defendant at the time of his election was not and is not now a resident of Juneau, Wisconsin, the home office.

Defendant demurred to the complaint on the ground that the same does not state facts sufficient to constitute a cause of action. An order was entered overruling the demurrer, from which order this appeal is taken.

For the appellants there were briefs by *Kading & Kading* of Watertown, and oral argument by *C. A. Kading.*

For the respondents there were briefs by *Clifford & Hartman* of Juneau, and oral argument by *G. A. Hartman.*

The following opinion was filed November 16, 1920:

SIEBECKER, C. J. The question is, Do the facts alleged in the complaint show that the 3,000 proxies presented by *Pautsch* were legal votes, in view of the fact that the required revenue stamps had not been affixed? The complaint shows that the proxies were not stamped as required by the internal revenue act (U. S. Comp. Stats. 1918, § 6318*a*, and sub. (11), Schedule A) and that they were rejected at the annual meeting for the election of officers of the insurance company upon that ground. It is to be observed that the question of the validity of the proxies between *Mr. Pautsch* and the persons who signed them is not raised here. The inquiry is whether or not they were properly rejected as votes at the election of directors of the company at the annual meeting. The allegations of the complaint can only be sustained upon a trial of the case by receiving in evidence these proxies so unstamped. The trial court held that, although the proxies were not stamped as required by the internal revenue act, they were legally voted and are competent evidence in a court to prove the complainant's election. The internal revenue act was construed in the case of *U. S. v. Masters,* 264 Fed. 250, to the effect that the revenue act of 1919 "provided for the retention in force

of all laws relating to the assessment and collection of taxes, so far as applicable, for the purpose of collecting stamp taxes omitted through mistake or fraud from any instrument, document, paper, or writing. U. S. Comp. Stats. Ann. Supp. 1919, § 6318*n*. The effect of the above provision was by reference to read into the revenue act of 1919 the provisions of the act of June 13, 1898, which has never been repealed." The act of June 13, 1898 (30 U. S. Stats. at Large, ch. 448), provided for a tax on proxies for voting for officers of any incorporated company (sec. 6 and Schedule A, p. 462), and sec. 13 of said act provides, respecting the using of unstamped instruments mentioned in Schedule A, among other things:

"And such instrument, document, or paper, not being stamped according to law, shall be deemed invalid and of no effect."

Sec. 14 of the same act provides:

"That hereafter no instrument, paper, or document required by law to be stamped, which has been signed or issued without being duly stamped, . . . shall be recorded or admitted, or used as evidence in any court until a legal stamp or stamps, denoting the amount of tax, shall have been affixed thereto, as prescribed by law."

The ruling in the case of *In re Hawley*, 220 Fed. 372, is in harmony with the idea that such an unstamped instrument is not a valid one and will not be recognized as evidence in the courts. In the light of these provisions it is considered that the proxies in question were at the time they were voted at the meeting of the insurance company "invalid and of no effect," and hence were properly rejected as votes cast for the election of director. The cases in this court determining the effect of omissions to stamp instruments under the revenue acts of June, 1864, and July, 1866, are not pertinent and authoritative on the questions presented here, for the reason that the provisions of the revenue act of 1919, which govern the instant cases, incorporate the above provisions of the revenue act of 1898, providing that unstamped instru-

ments are invalid, and cannot be used as evidence in court. *Lutton v. Baker* (Iowa) 174 N. W. 599, 6 A. L. R. 1696, note p. 1701.

It is contended that one August Kading, who voted at the annual meeting as a member of the insurance company, was not legally qualified to vote on account of his default in paying an assessment due from him and his consequent suspension as a member of the company, and that his vote was therefore wrongfully counted in favor of the election of *Miller* as a director. It is alleged that Kading failed to pay his assessment under the notice sent him pursuant to rules and regulations of the company, but the trial court correctly held that the vote of Kading was properly counted as a legal one because it is not alleged that the secretary gave him a second notice by mail, as required by section 18 of the company's by-laws, which is a necessary notice to be given to suspend a policy-holder as a member of the company in default of his paying his assessment pursuant to the first notice.

It is claimed that *Ferd. Lindemann* was not legally elected secretary of the company at the meeting of the board of directors upon the ground that *William F. Miller*, who voted at such directors' meeting for *Lindemann's* election, was not a legally elected director, and further, that *Lindemann* is disqualified from holding the office of secretary because he is not a resident of Juneau, Wisconsin. As above indicated, under the allegations of the complaint, *Miller* was duly elected a director by a majority of the legal votes cast at the annual meeting of the company, and he was therefore entitled to vote as a director at this meeting for the election of secretary of the company. It is urged that *Lindemann* was not qualified to hold the office of secretary since he was not a resident of Juneau, Dodge county, Wisconsin, as required by article 5 of the articles of organization of the company, which provides:

"The first officers of this association, for the purpose of incorporation, shall be as follows: E. A. Hopkins, president

and general manager, residing at Juneau, Dodge county, Wisconsin; George W. Morse, vice-president, residing at Juneau, Dodge county, Wisconsin; John C. Bachhuber, secretary, residing at Juneau, Dodge county, Wisconsin; *Theo. P. Hemmy,* treasurer, residing at Juneau, Dodge county, Wisconsin; who, together with T. A. McCallow of Juneau, Dodge county, Wisconsin, Andrew Bachhuber of Mayville, Dodge county, Wisconsin, Frank Flannigan of Ashippun, Dodge county, Wisconsin, J. T. Loos of Juneau, Dodge county, Wisconsin, and Andrew Lackas of Randolph, Dodge county, Wisconsin, shall constitute the board of directors until the first annual election on the first Monday in November, 1898. Each of said officers shall reside at the place of the home office of said corporation and shall continue in office until their successors have been chosen and have qualified as provided by the by-laws of said corporation. Said officers to hold their respective offices for a term of one year and each of said directors to be elected at the home office of said corporation at the city of Juneau, Dodge county, Wisconsin."

Section 6 of the by-laws provides that "All *officers* and *directors* shall be *bona fide* residents of the state of Wisconsin."

This clearly indicates that the directors are not classed as officers of the company within the contemplation of the provisions of article 5 and that the officers referred to in the last sentence of this article refer to the president, vice-president, secretary, and treasurer. Does the sentence, "Each of said officers shall reside at the place of the home office of said corporation," apply to such officers as would be elected annually thereafter, or only to those named in the article as the first officers? We think it is manifest that this requirement of residence of the officers applies to all officers other than those named as the first officers of the association. From this it follows that *Lindemann* was not qualified to hold the office of secretary and that he unlawfully intruded into the office and dispossessed *L. C. Pautsch* as secretary, who was entitled to hold this office until a successor was duly elected and qualified to hold the office.

Upon these considerations it follows that the trial court properly overruled the demurrer to the complaint in the case against *Ferd. Lindemann,* but erred in overruling the demurrer to the complaint in the case against *William F. Miller.* The cause must be remanded with the direction that the order overruling the demurrer in the *Lindemann Case* is affirmed, and that the order overruling the demurrer in the *Miller Case* is reversed, with direction to enter an order sustaining the demurrer in this latter case, and that the causes are remanded for further proceedings according to law.

By the Court.—It is so ordered.

On January 11, 1921, a reargument was ordered on the following question:

Do the revenue acts of Congress of 1914 and 1919 retain in force all material provisions of the revenue act of Congress of June 13, 1898, relating to the assessment and collection of taxes, and the provision making unstamped instruments, documents, and papers invalid, of no effect, and unrecordable and incompetent as evidence?

For the appellants the causes were submitted on the brief of *Kading & Kading* of Watertown, and for the respondents on that of *Clifford & Hartman* of Juneau.

A brief was also filed by *Douglass Van Dyke* of Milwaukee as *amicus curiæ,* on behalf of the Milwaukee Bar Association.

The following opinion was filed March 8, 1921:

SIEBECKER, C. J. A reargument has been had, and we are satisfied that we arrived at an erroneous conclusion in the decision heretofore announced. The error was occasioned by holding that certain provisions respecting the stamping of proxies and their competency as evidence were in force as parts of the revenue acts of Congress of 1914 and 1919. We there held that these revenue acts of Congress provided for reading into them all the existing laws

relating to the collection of taxes so far as applicable, and that certain existing revenue laws so read into the later laws rendered unstamped proxies invalid and that they could not be voted at a corporate election, upon the ground that secs. 13 and 14 of the act of June 13, 1898, were then in force and became part of the acts of Congress of 1914 and 1919 and made such unstamped proxies void and incompetent as evidence. The reargument discloses that sections 7, 13, 14, and 15 of the act of June 13, 1898, which provide that certain unstamped instruments, including proxies, should not be competent evidence in court, should be deemed invalid and that the record, registry, or transfer of any such instrument should not be used in evidence, were not included in the act of 1914 or 1919. Though these sections were incorporated in the bill passed by the House of Representatives, they were in fact eliminated by amendment in the Senate, and as so amended the bill was finally concurred in by the House of Representatives; thus expressly eliminating the provisions as they had been in secs. 7, 13, 14, and 15 of the act of June 13, 1898. This clearly indicates that Congress did not intend that any of these provisions of the act of June 13, 1898, were to be read into the acts here in question. It necessarily follows that we were in error in our former opinion in declaring that the provisions of secs. 13 and 14 of the 1898 act were read into the 1914 act. The case of *Cole v. Ralph,* 252 U. S. 286, 40 Sup. Ct. 321 (decided March 15, 1920), was first called to our attention after the former decision in this case had been announced. It was there held that the omission of the required revenue stamps from deeds did not make the instruments incompetent as evidence. The deeds received in evidence in that case over objection were without the stamps required by the act of October 14, 1914. In speaking on this subject the court declared:

"But this neither invalidated the deeds nor made them inadmissible as evidence. The relevant provisions of that

act, while otherwise following the language of earlier acts, do not contain the words of those acts which made such an instrument invalid and inadmissible as evidence while not properly stamped."

The defendant *Miller* contends that the court had no power to order this rehearing because neither party had made a motion for that purpose and because the order of the court directing a rehearing was not made within thirty days after the original decision of the case in this court was filed. The record was ordered to be retained by the court within sixty days after such decision was announced. Under these circumstances the court had the power to order a rehearing. *State ex rel. Postel v. Marcus,* 160 Wis. 354, 152 N. W. 419.

It is further urged that the former decision of this court overruling the order appealed from in the *Miller Case* was correct upon the ground that the presiding officer and inspectors of election at the corporate meeting wherein the unstamped proxies were voted were justified in rejecting the votes based on such proxies for the reason that reception of such ballots by the presiding officer and inspectors would have subjected them to a penalty under the provisions of sec. 6318*k*, 1919 Supp. to U. S. Comp. Stats. (Act February 24, 1919, ch. 18, sec. 1102, 40 U. S. Stats. at Large, 1133). The act provides: "Whoever makes, signs, issues, or accepts, . . . any instrument, document, or paper of any kind or description whatsoever without the full amount of tax thereon be duly paid, . . . is guilty of a misdemeanor" and subject to a fine. The claim that an acceptance of the votes by the inspectors and presiding officer representing the unstamped proxies constituted an unlawful acceptance of the unstamped proxies by such officer and inspectors of ballots within the contemplation of the foregoing section, is not sustained. Receiving and counting such ballots does not necessarily imply that the proxies were accepted by the persons conducting the elections; the proxies may have been approved by others

who were acting as officers of the company. Furthermore, while the word "accept" as used in this statute may refer to the persons to whom the proxies were given and by whom they were accepted, it cannot be said that the persons conducting the corporate election came within the terms of this statute.

Upon the grounds above stated the former decision reversing the order appealed from in the *Miller Case* was erroneous, and the mandate in this case must be that the orders appealed from are affirmed.

By the Court.—It is so ordered.

PERKINS and others, Appellants, vs. PERKINS, Respondent.

October 22, 1920—March 8, 1921.

Adverse possession: Presumption from continued occupancy: Possession by second husband of lands of widow and her children: Notice of adverse claim: Recording tax deed as notice: Limitation of action on tax deed: Possession of one cotenant: Recovery for improvements: Taxes: Estoppel.

1. All reasonable presumptions are to be made in favor of the true owner of land, including the presumption that actual possession is subordinate to the right of the true owner, subject to the limitation that actual, continuous, exclusive possession for the statutory period, unexplained, creates a presumption of fact that such possession was characterized by all the requisites to establish title by adverse possession.
2. Where defendant, on marrying a widow, took possession with her and her children of land which had been owned by her deceased husband and in which the widow owned a dower interest and her minor children a part interest, his entry into possession was permissive and not hostile or adverse.
3. The recording of a tax deed does not give constructive notice of the claim under a deed to the former owners of the property, registry of the deed being notice only to those who claim through or under the grantor or who subsequently deal with the title to the premises.
4. Continued possession of premises after entry by permission of the true owners is not adverse to such owners so as to defeat their title until after the possessor has asserted a claim

of title to the land in such a way as to bring his claim to the notice of the owners.

5. Sec. 1187, Stats., barring an action by the grantee in a tax deed unless he shall be in actual, not constructive, possession of the land for three successive years within the next five years after the recording of the tax deed, operates in favor of the possessor to bar the title of whichever party, the original owner or the tax-title claimant, was, during the three years next after the recording of the tax deed, out of actual possession and thus compelled to resort to legal proceedings to obtain possession.
6. A finding that one of seven heirs to property was in possession thereof during the three years after the defendant secured a tax deed to the premises sets the statute (sec. 1187) running against defendant in favor of all of the heirs, since the possession of that heir, being the possession of a cotenant, was for the benefit of all the cotenants.
7. Under sec. 1187, requiring the possession of the tax-title claimant to be actual, not constructive, and sec. 1190, providing that possession, within the meaning of sec. 1187, is governed by the rules prescribed for determining adverse possession by one claiming title founded on a written instrument, the possession of a tax-title claimant which was permissive and in subordination to the title of the former owners was the possession of the former owners and operated to bar the tax title.
8. One whose possession of premises was not adverse by color of title asserted in good faith cannot recover for improvements made on the premises under secs. 3096, 3097, Stats.
9. The tax deed being fair on its face, the tax proceeding regular, and the defendant having been defeated by virtue of sec. 1187, Stats., the provisions of sec. 3087 do not apply, and the defendant is not entitled to offset taxes on the premises paid by him.
10. An essential element of estoppel by silence or implied misrepresentation being that the opposite party is misled by the conduct complained of, the failure of the owners of the land to assert their title does not estop them from thereafter asserting it, where the defendant knew exactly what their title was and did nothing in reliance upon their conduct.

APPEAL from a judgment of the circuit court for Eau Claire county: JAMES WICKHAM, Circuit Judge. *Reversed.*

Ejectment. On January 7, 1891, John I. Brougham was the owner of the land described in the complaint and on

that day died intestate, leaving the following heirs: *Della Brougham,* daughter, now *Della Perkins,* aged twenty-eight years; *Fred Brougham,* son, aged twenty years; *Kate Brougham,* daughter, now *Kate Perkins,* aged eighteen years; *John Brougham,* son, aged fifteen years; *Mary Brougham,* now *Mary Jones,* aged thirteen years; Clarence Brougham, son, aged nine years, who died January 2, 1901, leaving no heirs; Clara Brougham, daughter, aged five years, who died intestate November 12, 1909, at the age of twenty-four years, leaving her surviving her husband, *Eugene Rossman,* and two sons, Forest Rossman, who died in 1910, and *Howard Rossman,* born March 4, 1909, and who is now living, and *Nellie,* a daughter, aged three years. John I. Brougham also left him surviving his widow, Lanis Brougham, who married the defendant, *Morris Perkins,* on January 1, 1893, and who died January 22, 1919. The plaintiffs are the sole surviving heirs at law and successors in interest of John I. Brougham, deceased.

After the marriage of the widow and the defendant, and in the month of November, 1894, the widow, her husband, and four minor children moved upon the premises. All of the minor children, except the plaintiff *Nellie Brougham,* ceased to live upon the premises during or prior to the year 1899. *Nellie Brougham* continued to make her home on the premises with the defendant and her mother until the death of her mother January 2, 1919. The defendant purchased tax certificates upon the premises, sale of 1894, tax of 1893, and on December 11, 1897, he caused a tax deed of the premises to be issued to himself. In the year 1894 and subsequently the land was assessed to the defendant and he paid the taxes thereon from that year to the time of trial. It appeared that the defendant and his wife had remained in possession of the premises from the time they occupied them in November, 1894, down to the time of the death of the wife, and that the defendant occupied the same at the time of the commencement of this action. During that time the

defendant had cultivated and improved the premises. It further appears, without dispute, that the heirs of John I. Brougham, when not residing upon the premises, have resided in the vicinity and had full knowledge of the fact that the premises were in the possession of the parties as stated; that they never made any demand for an accounting for rents or profits. The reason they give for their failure to make such a demand is that they did not do so out of deference to their mother. None of the children knew that *Perkins* claimed to be the owner of the farm until at or about the time of the mother's death. The four children, *Mary*, Clarence, Clara, and *Nellie*, were members of the family at the time *Mr.* and *Mrs. Perkins* moved upon the premises. Clarence remained about five years and Clara about eight years, and from the time of the marriage the defendant supported the children, sent them to school, clothed them and paid doctor's bills, and treated them as members of his family. At the time the defendant procured the tax deed he made an affidavit of nonoccupancy in which he swore that the land had not been "occupied or possessed by any person for a period of thirty days within the last six months other than himself." In his answer the defendant claimed to be the owner of the premises under and by virtue of the tax deed referred to. In support of his claims under the tax deed, he claimed the benefit of secs. 1188, 1189*a*, 1189*b*, and 1190 of the Wisconsin Statutes, being statutes of limitation. He further claimed that he entered into possession of the premises on the 11th day of December, 1897, under claim of title, basing such claim upon a written instrument as being a conveyance of such premises; that he claimed under and by virtue of the tax deed; that he had been in possession of said premises for more than ten years immediately preceding the commencement of this action; that, as purchaser and grantee of said premises under said deed, he had been in the actual and continued occupation of said premises adverse to and ex-

clusive of every right under claim of title, founded upon the deed, claimed the benefit of secs. 4211, 4212, and 4215, Stats., and pleaded said statutes in bar of the action; claimed title by reason of adverse possession for more than twenty years under secs. 4213, 4214, 4215, and 4207, Stats.; claimed title by way of estoppel, and by way of counterclaim set up title under the tax deed, asked that his title be confirmed, and, in the event that the plaintiffs' title is held paramount to that of the defendant, then for the value of the improvements made and taxes paid by him. The jury found a special verdict as follows:

"(1) What is the reasonable value of the rents and profits of the premises described in the complaint since February 26, 1913, exclusive of the value of the use of the improvements made thereon by the defendant? *A.* $456.

"(2) What is the amount of money paid and the amount of interest thereon, computed at fifteen per cent. per annum, for the purchase of the land at the tax sale, for executing and recording the tax deed, and for taxes subsequently paid thereon? *A.* $829.16.

"(3) What is the present value of the improvements made by the defendant on said premises as they now exist, over and above the value of the rents and profits enjoyed by the defendant prior to February 26, 1913? *A.* $3,860.

"(4) Did the defendant, while in possession of the premises, hold the premises adversely to all persons not in possession under color of title asserted in good faith? *A.* No."

The court found, in addition to the facts already stated:

"That ever since the 11th day of December, 1897, the defendant has held said premises and been in the actual, continuous occupation and possession thereof, and of the whole thereof, exclusive of every other right, except as to the plaintiff *Nellie Brougham,* and for more than twenty years immediately preceding the commencement of this action the said premises, and the whole thereof, have been cultivated and improved and have been protected by substantial inclosure by the defendant, and that each of the plaintiffs, except the plaintiff *Nellie Brougham,* are barred from the right to recover possession thereof or any right or title therein.

"That the tax deed under which defendant claims title is voidable as to the plaintiff *Nellie Brougham,* for the reason that she has been in possession of said premises in the manner stated in finding No. 3 at all times since the taking and recording thereof, until about January 22, 1919, and that the said *Nellie Brougham* is the owner in fee of an undivided one-seventh interest in and to the lands described in the complaint, and is entitled to the possession thereof upon compliance with the terms hereinafter ordered.

"That the defendant is the owner in fee and entitled to the possession of an undivided six-sevenths of said premises."

Judgment was entered accordingly, *Nellie Brougham* being required to pay $53.31, with interest, as a condition of judgment in her favor being entered. From such judgment the plaintiffs appeal.

The cause was submitted for the appellants on the brief of *J. C. Gilbertson* and *A. J. Sutherland,* both of Eau Claire, and for the respondent on that of *Sturdevant & Farr* of Eau Claire.

The following opinion was filed December 14, 1920:

ROSENBERRY, J. The pivotal question in this case is whether or not the defendant was divested of his title under and by virtue of the tax deed by the possession of the plaintiffs.

All reasonable presumptions are to be made in favor of the true owners, including the presumption that actual possession is subordinate to the right of the true owner, subject, however, to the limitation that actual, continuous, exclusive possession for the statutory period, unexplained, displaces a presumption in favor of the true owner and creates a presumption of fact that such possession, and the commencement of it, were characterized by all the requisites to title by adverse possession. *Meyer v. Hope,* 101 Wis. 123, 77 N. W. 720; *Illinois S. Co. v. Budzisz,* 106 Wis. 499, 514, 82 N. W. 534.

The possession of the defendant in this case, however, is not unexplained. It is fully and completely explained. The acts of the defendant, as well as of his deceased wife, fully characterize his possession at the time of entry. The trial court found that they went upon the premises in November, 1894. At that time the defendant had no title to nor interest in the land. He was the owner of a tax certificate issued upon the sale of 1894 for taxes of 1893, but made no claim to title under such certificate at that time nor subsequently. His entry, therefore, was clearly permissive. His wife was the owner of a dower interest, the minor children who accompanied him were part owners of the premises. Under such circumstances the entry of the defendant was permissive and not hostile or adverse. *Ayers v. Reidel,* 84 Wis. 276, 54 N. W. 588; *Allen v. Allen,* 58 Wis. 202, 16 N. W. 610; *Bannon v. Brandon,* 34 Pa. St. 263; *Johnson v. Oldham,* 126 Ala. 309, 28 South. 487; *De Witt v. Shea,* 203 Ill. 393, 67 N. E. 761.

The evidence is undisputed that the defendant never did anything to assert title under his tax deed, or made any claim adverse to plaintiffs, until at or about the time of his wife's death; that none of the plaintiffs knew that he had or claimed to have any interest in or to the premises, and it is a fair inference from the evidence that they supposed that he occupied the same under such title or right as his wife, their mother, had. If it be said that the recording of the tax deed by the defendant operated as notice to the plaintiffs or any of them, it is sufficient to say that by the terms of the statute the recording of a deed is notice, not to prior owners, but to those who subsequently deal with the title. It is sometimes said that such recording is constructive notice to all the world. This statement is too broad. Registry of a deed is notice only to those who claim through or under the grantor or subsequently deal with the title to the premises. *Ely v. Wilcox,* 20 Wis. 523; 39 Cyc. 1721, and cases cited.

While the record of the tax deed was notice to all persons dealing with the title to the premises subsequent thereto, it was not notice to the plaintiffs or any of them. The defendant testified:

"I am not able to say that they [the plaintiffs] knew I was in possession, but can say this much: they came and went as they were a mind to there. . . . I suppose they came to visit their mother."

The defendant said no word, performed no act, made no claim, and asserted no right that tended to arouse in the minds of the plaintiffs any question as to the character of his possession or to indicate to them that he claimed under any different or other right than that under which he went into possession, and that was the right of his wife and children.

The entry of the defendant being permissive in character and his possession not being adverse, neither the twenty nor ten-year statute of limitations began to run until knowledge of his adverse claim was in some way brought home to the true owner. *Allen v. Allen,* 58 Wis. 202, 16 N. W. 610.

The acts of the defendant in procuring the land to be assessed to him, the payment of taxes thereon, the possession and improvements made thereon by him, unexplained, might well afford a basis for a finding that his possession was adverse. His acts during the time that his possession was permissive were of the same character and extent as they were after the execution and recording of the tax deed. Until the defendant brought home to the plaintiffs that he was acting under a different right than that under which he entered, his possession remained permissive and his right subordinate to the true owners.

The trial court found that from the date of the tax deed the possession of the defendant was adverse to plaintiffs. We find no evidence in the record upon which such finding can be based except that relating to the recording of the tax

deed, and that, as we have shown, was ineffective unless knowledge thereof was actually brought home to the plaintiffs. Where a father procured a patent to lands to be issued in the name of his son, then a minor, and went into possession of the lands and recognized the son's title for some years after he took possession of the lands, this court said:

"After such entry and recognition of the son's title, the possession of the father would not become adverse until he did some act disavowing the right of the son; and asserting title in himself in hostility to the son's title, and such disavowal of the son's title, and his claim to hold in hostility to the title under which he took possession, must be brought to the knowledge of the son before the statute could be set to running under such subsequent possession." *Allen v. Allen,* 58 Wis. 202, 16 N. W. 610. See, also, *Bartlett v. Secor,* 56 Wis. 520, 14 N. W. 714; *Quinn v. Quinn,* 27 Wis. 168.

The obligation of the defendant to bring home to the plaintiffs knowledge of the fact that he made a claim to the premises adverse and hostile to their interest was greater by reason of the fact that they, or some of them at least, were members of his family, under his care and protection.

Under the facts and circumstances of this case, the ordinary rule that a hostile claim may be inferred from acts of dominion over property such as were exercised by the defendant over the premises in question and that such acts of dominion are presumed to be in hostility to the true owner, has no application. The facts being fully explained, the nature of his entry being clearly established, no room is left for the operation of presumptions. In his amended answer the defendant makes no claim of adverse holding prior to the 11th day of December, 1897, the date of the tax deed, and if such claim were made we find no evidence in the record to support it.

The defendant claims title by virtue of his tax deed under the provisions of sec. 1187, Stats., which provides that no action shall be maintained by the grantee in a tax deed

unless such grantee, or those claiming under him, shall be in actual, not constructive, possession of the land so demanded for three successive years during the five years next after the recording of such deed. This statute operates in favor of the possessor to bar the title to whichever party—the original owner or tax-title claimant—was, during the three years next after the recording of the tax deed, out of actual possession and thus compelled to resort to legal proceedings to obtain such possession. *Falkner v. Dorman,* 7 Wis. 388; *Swain v. Comstock,* 18 Wis. 463; *Laffitte v. Superior,* 142 Wis. 73, 125 N. W. 105.

The trial court held that as to the plaintiff *Nellie Brougham* the tax deed was voidable, but held it valid as to the other plaintiffs. The only difference in the situation of the plaintiffs was that the plaintiff *Nellie Brougham* remained upon the premises in question, from the time she went there with her mother and stepfather in 1894, for many years. If her occupation was such as to set the statute running in her favor and against the defendant, then the statute must run in favor of the other plaintiffs against the defendant, because her possession, being the possession of a cotenant, was for the benefit of all the cotenants and was in law their possession. 38 Cyc. 21.

It is to be noted that under the provisions of sec. 1187, Stats., the possession of the tax-title claimant is required to be not constructive but actual. Sec. 1190 provides that possession, within the meaning of sec. 1187, shall be governed by the rules prescribed for determining an adverse possession by a person claiming title founded upon a written instrument. The possession of the defendant as to the plaintiffs being permissive and in subordination to their title, it was, as we have held, not adverse. The possession of the parties in this case, including that of defendant, therefore, was the possession of the plaintiffs, and operated to bar the defendant of any rights under his tax deed, he having not begun any action within the time prescribed by statute.

The defendant did not hold adversely by color of title, asserted in good faith, and therefore is not entitled to recover for improvements under the provisions of secs. 3096, 3097.

Defendant contends that plaintiffs are estopped to assert their title at this late day. It is argued that it was the duty of plaintiffs to speak, and that because they remained silent over a long period of years, during which time the defendant placed valuable improvements upon the premises, they ought not to be allowed to assert their title as against the defendant. One of the necessary elements of estoppel by silence or implied misrepresentation is that the opposite party must be misled by the conduct complained of. The defendant was not misled by the conduct of plaintiffs or any of them. He knew exactly what their title was and the entire situation. He did nothing in reliance upon their conduct. The principal elements of estoppel are wanting. *Prieve v. Wis. S. L. & I. Co.* 103 Wis. 537 (79 N. W. 780), at p. 552.

If the result reached in this case seems to be harsh as to the defendant, we can only say it is due to a situation created by the acts of the defendant himself. His long-continued silence with reference to his rights under the tax deed created a situation which has operated to deprive him of benefits to which he might otherwise have been entitled. On the other hand, it would be most unconscionable to permit a person occupying a *quasi*-parental relationship to a family of children to acquire title to premises owned by them and their mother, his wife, under the circumstances shown by the evidence in this case. The jury found that the defendant did not hold possession of the premises in good faith. If his possession had been adverse it might have ripened into a good title, whether he acted in good faith or not. But having entered the premises in subordination to the title of the plaintiffs, the law, as well as fair dealing, required him to acquaint his wards with any change in the situation which might operate to divest them of their title

to the property inherited from their father and vest it in him. This the defendant failed to do. The plaintiffs are entitled to judgment as prayed in the complaint, establishing their title to the premises, ousting the defendant, and for mesne profits as found by the jury, less the amount of taxes and interest paid by the defendant during the six-year period.

By the Court.—Judgment reversed, with directions to the lower court to enter judgment for the plaintiffs in accordance with this opinion.

A motion by the respondent for a rehearing was denied, with $25 costs, on March 8, 1921, and the following opinion was filed March 14, 1921:

ROSENBERRY, J. The respondent moves for a rehearing, claiming that he is entitled to recover taxes paid by him upon the premises in question under the provisions of sec. 3087, Stats. Upon this motion we have re-examined the question and are of the opinion that the defendant is not entitled to offset taxes for any part of the period in question. The plaintiffs did not recover by reason of any defect or insufficiency in the tax deed. The deed was fair upon its face and the tax proceedings, so far as the record discloses, were regular. The defendant is defeated by virtue of the provisions of sec. 1187, Stats., which operated in this case to bar him of any right to the premises in question, and not by reason of any defect in his tax deed or in the tax proceedings. The jury, in answer to the fourth question, having found that the defendant did not hold possession of the premises in good faith, the court is of the opinion that the extent of his offset must be limited to his legal rights. The original opinion is therefore modified to read as follows:

The plaintiffs are entitled to judgment as prayed in the complaint establishing their title to the premises, ousting the defendant and for mesne profits as found by the jury.

The mandate is amended to read as follows:

Judgment reversed, with directions to the lower court to enter judgment for the plaintiffs in accordance with the opinion as modified.

PINKERTON and another, Appellants, vs. BUECH and others, Respondents.

MANUFACTURERS & MERCHANTS INSPECTION BUREAU, Appellant, vs. SAME, Respondents.

FERRIS, Appellant, vs. SAME, Respondents.

October 22, 1920—March 8, 1921.

Detectives: Regulation by legislature: Constitutional law: Licenses: Determination of competency and integrity of applicants: Requirement that police authorities approve application: Review: Injunction against arrest under void statute.

1. Injunction against issuing or applying for the issuance of warrants may be invoked to protect property rights and for protection against prosecution in criminal proceedings under invalid statutes.
2. Under its police power the legislature may regulate private detectives, as has been done by ch. 444, Laws 1919 (sec. 1636—12*m*, Stats. 1919).
3. Ch. 444, Laws 1919, providing in sec. 1 that the business of private detective agencies shall not be conducted without a license; in sec. 2 that any person, partnership, or corporation intending to act as a private detective and establish an office in any city in this state shall present to the secretary of state an application which must be approved by the fire and police commission of those cities having such a commission, and by the chief of police in other cities wherein the office is located; and in sec. 3 that the secretary of state shall issue to the applicant a license if he shall find him to be of good character, competency, and integrity, the requirements as to competency, character, and integrity furnish a standard for action by the fire and police commissions of municipalities in approving or disapproving the application of those desiring to become private detectives.
4. The provision of the act that the application for a license shall be submitted to the fire and police commissions of municipalities or to the chief of police is not an unlawful delega-

tion of legislative power, the act providing a standard of qualifications and authorizing the issuance of a license only to persons of good character, competency, and integrity.

5. Although the act itself establishes no system for review by the courts, yet where administrative officers, vested with the power to determine the applicant's character, qualifications, and integrity, act arbitrarily and wrongfully refuse approval, the courts may review the matter by proper remedies.

6. The provision that the application shall be approved by the fire and police commission in cities having such commission and in others by the chief of police, and in addition by five reputable citizens, is not discriminatory as between applicants intending to engage in the business of private detectives in cities having such a commission and those in cities having none, the classification resting practically on matters of enforcement.

7. A complaint by applicants desiring to engage in the business of private detectives that the fire and police commission of the city of Milwaukee, authorized by ch. 444, Laws 1919, to pass on their applications, capriciously and wrongfully refused to grant the applications, states a good cause of action, and is not subject to demurrer.

APPEALS from an order of the circuit court for Milwaukee county: G. N. RISJORD, Judge. *Reversed.*

The complaints in the cases are substantially the same and allege that the plaintiffs made application to the police and fire commission of the city of Milwaukee pursuant to the provisions of ch. 444, Laws 1919, for approval of applications to engage in the business of private detective for hire, but that the members of the commission, acting arbitrarily, capriciously, and in entire disregard of the evidence presented to it and of the facts, refused to grant its approval. A general demurrer was filed by defendants to the complaint in each case.

Upon a hearing the circuit court entered an order vacating and setting aside an order theretofore made restraining the defendants from issuing or applying for the issuance of any warrant for the arrest of the plaintiffs, their agents or employees, for violating the provisions of ch. 444, Laws 1919, and also sustaining the demurrer to the plaintiffs' complaint, with leave to amend within twenty days.

For the appellants *Pinkerton* there was a brief by *Roehr & Steinmetz,* attorneys, and *Julius E. Roehr,* of counsel, all of Milwaukee; and the cause was argued orally by *Julius E. Roehr.*

For the appellant *Manufacturers & Merchants Inspection Bureau* there was a brief by *Lamfrom, Tighe & Wallach,* attorneys, and *Leon B. Lamfrom* and *Marvin W. Wallach,* of counsel, all of Milwaukee; and the cause was argued orally by *Leon B. Lamfrom.*

For the appellant *Ferris* there was a brief by *Lines, Spooner & Quarles* of Milwaukee, and oral argument by *Willet M. Spooner.*

For the respondents there was a brief by *Winfred C. Zabel,* district attorney of Milwaukee county, *Daniel W. Sullivan,* first assistant district attorney, and *William L. Tibbs,* special assistant district attorney; and the cause was argued orally by *Mr. Sullivan* and *Mr. Tibbs.*

The following opinion was filed January 11, 1921:

SIEBECKER, C. J. The remedy by injunction is properly invoked by the plaintiffs in this action to protect them in their property rights and against prosecution in criminal proceedings under invalid statutes. "It is well settled that where property rights will be destroyed, unlawful interference by criminal proceedings under a void law or ordinance may be reached and controlled by a decree of a court of equity." *Dobbin v. Los Angeles,* 195 U. S. 223, 25 Sup. Ct. 18; *Bonnett v. Vallier,* 136 Wis. 193, 116 N. W. 885; *Income Tax Cases,* 148 Wis. 456, 134 N. W. 673, 135 N. W. 164; *Wadhams Oil Co. v. Tracy,* 141 Wis. 150, 123 N. W. 785.

The subject embraced in ch. 444, Laws of 1919 (sec. 1636—12*m,* Stats.), is a proper one for legislative regulation within the police power. *Lehon v. Atlanta,* 242 U. S. 53, 37 Sup. Ct. 70; *Fox v. Smith,* 123 App. Div. 369, 108 N. Y. Supp. 181.

"Under the power reserved to the state to regulate the relative rights and duties of persons within its territory, it may lawfully require examinations to determine the general fitness of a person engaging in vocations directly connected with public safety or person and property." 17 Ruling Case Law, p. 547, § 62.

The occupations, trades, and callings subject to license and regulation are most extensive in range and variety. For a partial list of them see 17 Ruling Case Law, pp. 548, 549, § 63.

Ch. 444, Laws 1919, provides for the regulation of private detective agencies and prescribes penalties for its violation. Sec. 1 provides that such business shall not be conducted by any person, copartnership, or corporation without first having obtained a license to do so from the secretary of state. Sec. 2 enacts that:

"Any person, copartnership or corporation intending to act as a private detective for hire or reward or to conduct the business of private detective or detective agency or advertise said business shall present to the secretary of state and file in his office a written application duly signed and verified . . ." by the applicant in person, or the copartners, or by the specified officer if applicant is a corporation; "and if such person, copartnership or corporation intends to establish an office in any city in this state such application must be approved in each instance by the fire and police commission of those cities having a fire and police commission, but in those cities where there is no fire and police commission by the chief of police of said city and, in addition thereto, by not less than five reputable citizens, freeholders of the county where the applicant or applicants propose to establish such office."

The application must, among other things, state the city of the proposed place of business, *"and such further facts as will show the good character, competency and integrity of such applicant."* Sec. 3 provides that the secretary of state shall issue to the applicant a license if he shall find him to be of *good character, competency and integrity*,

upon the payment of $200 license fee and the furnishing of the required bond. The complaint charges that the plaintiffs duly applied to the fire and police commission of the city of Milwaukee for approval of their application to the secretary of state for such license, but that the commissioners wrongfully and arbitrarily refused to approve the application. The appellants admit that the standard of qualifications prescribed by the act to be applied by the secretary of state in determining whether or not an applicant for such a license is a proper person to be licensed to conduct the business of private detective for hire is an appropriate regulation. It is claimed (1) that no standard or test of qualifications of such an applicant is provided for upon which the fire and police commission or the chief of police of a city are to act for approving a written application for such a license, and that such commissioners and chief of police are therefore vested with an arbitrary power in giving or withholding their approval of the written application for such a license, and that this renders the legislation invalid as violative of plaintiffs' constitutional rights, in that it deprives them of due process of law and of the equal protection of the law; (2) that the act attempts to confer legislative power on a municipal agency and officer; (3) that plaintiffs are deprived of the right of judicial review of the wrongful acts of such municipal agency or officer; and (4) that the act is discriminatory between persons seeking to pursue the same vocation.

The test and standard of qualifications prescribed by the statute for obtaining the license is that the applicant shall be a person of *good character, competency,* and *integrity.* This standard is an ascertainable and known one, and is readily understood as a matter of common knowledge when applied to the subject to which it refers. It is one frequently employed in legislative regulations for licensing vocations and has been applied in many instances in the legislation of this and other states. It is strenuously asserted that the

provisions of sec. 2 of this act do not prescribe any standard of qualifications upon which the fire and police commission or chief of police are to act in granting or withholding approval of the written application for such a license to the secretary of state, and that the provisions of the act permit them to deny their approval in an arbitrary manner. A reading of the whole act and a study of the relations of its various provisions indicate that the legislature had in mind a regulation of private detective business for the purpose of securing the business against persons *who lacked good character, competency, and integrity,* and to assure the public that those persons licensed to engage in this business possess these qualifications. The provisions of sec. 2 must be construed in view of this object. The parts of this section providing for the approval of the written application by the fire and police commission or the chief of police before filing it with the secretary of state is followed by the provision that:

"Such application shall state the age, residence, present and previous occupation of such applicant or applicants and the name of the city where the principal place of business is, or is to be located, and such further facts as will show *the good character, competency and integrity* of such applicant or applicants."

Manifestly the facts thus required to be shown by the written application are declared by legislative action as the standard of qualifications which entitles the applicant to have his application approved. It naturally follows from this that approval or disapproval of the application is to be based on such standard of qualifications and that the facts shown by the written application are to be acted on by the persons designated in the statute to perform this duty.

As declared in *Milwaukee v. Ruplinger,* 155 Wis. 391, 395, 145 N. W. 42, "There is no principle better established than that a law may be made, complete in itself, and be left to some officer or tribunal to determine the facts requisite

to application of the enactment to a given case." It is manifest from the provisions of this law that the legislature intended to provide a method of licensing private detective agencies who possess the qualifications prescribed in the law, and that the fire and police commissions or chiefs of police are to pass on such qualifications to be presented to the secretary of state upon the facts disclosed in the written application. We perceive no reason why the legislature may not select such officers specified in the law as an appropriate agency to perform this duty. Such officers by reason of their official duties are naturally considered well qualified to pass judgment on matters involved in discharging this function. The object sought to be accomplished by the act is that only such persons are to be licensed to engage in private detective business as meet the calls of the standards prescribed by the legislature. This method of ascertaining such qualification or regulating vocations and businesses has been approved in various cases. *Mehlos v. Milwaukee,* 156 Wis. 591, 606, 146 N. W. 882; *State ex rel. Bucll v. Frear,* 146 Wis. 291, 131 N. W. 832; *Milwaukee v. Ruplinger,* 155 Wis. 391, 145 N. W. 42; *State v. Lange C. Co.* 164 Wis. 228, 157 N. W. 777, 160 N. W. 57; *State ex rel. Adams v. Burdge,* 95 Wis. 390, 70 N. W. 347; 17 Ruling Case Law, p. 541, § 58 *et seq.*

It is urged that applicants for licenses are deprived of judicial review in case the secretary of state and the persons whose approval of the application is required arbitrarily and wrongfully refuse such approval and thus deprive the applicant of his right to a license. It is a well established principle of law that capricious or fraudulent conduct in the discharge of an administrative or *quasi*-judicial duty can be reviewed by the courts and an appropriate remedy be employed to redress the wrong thereby committed.

In speaking on this subject, this court in *State ex rel. Coffey v. Chittenden,* 112 Wis. 569, 88 N. W. 587, says:

"Where there is no reasonable ground to justify a de-

cision by such officer or board other than one way, and there is a failure to act accordingly, the function of a *mandamus* proceeding is broad enough to remedy the mischief by compelling the making of such decision, in perfect harmony with the rule that the office thereof is not to control discretionary authority, but to compel the exercise thereof. . . . [If] no reasonable ground for any conclusion other than that the conditions precedent to the performance of such duty exist, and a decision is made to the contrary or performance thereof is refused, such conduct is not the exercise of discretionary power, but a refusal to exercise it,—a refusal or neglect to perform a plain duty imposed by law; and, there being no adequate legal remedy, the way is open for the extraordinary jurisdiction of the court to award its writ of *mandamus.*"

The cases there cited need not be repeated. If, under the pretense of exercising the power of disapproval, the fire and police commissioners and the chief of police act in manifest disregard of the facts before them, resulting in injustice, gross abuse, or avoidance of duty, the power of the courts can be invoked to redress the wrong, on the ground that such action in contemplation of law is not a discharge of a discretionary duty, but a substitution of an "arbitrary and fraudulent disposition and determination of the question submitted for the honest discretion demanded by law." *State ex rel. Brown v. Dental Examiners,* 38 Wash. 325, 80 Pac. 544; *State ex rel. Buchanan v. Kellogg,* 95 Wis. 672, 70 N. W. 300.

It is contended that the act unlawfully discriminates between applicants intending to engage in business in cities having a fire and police commission and those in cities having no such commission, and that it unlawfully discriminates against persons intending to locate in cities as compared with those located outside of cities. These distinctions rest largely on grounds pertaining to the practical enforcement of the policy to regulate this business. In that field the legislature has the broadest discretion. "The question is not whether there may be some on one side of the line

whose situation is practically the same as that of some on the other side, but whether there is a 'distinction between the classes as classes, whether there are characteristics which, in a greater degree, persist through the one class than in the other which justify legal discrimination between them.' " *Borgnis v. Falk Co.* 147 Wis. 327, 356, 133 N. W. 209.

A detective agency located in cities in the nature of things operates in a field clearly distinguishable from one operating in the country outside of cities and constitutes a distinction that warrants the legislature in providing different regulations for it. Obviously the state attempted to select the persons to act for it in passing on the qualifications of applicants to operate in cities who are well informed on the subject and have knowledge concerning the business. It would seem that the fire and police commissioners and chiefs of police of cities are more likely to meet these requirements than the generality of citizens and hence were appropriately and properly designated by the legislature. We discover no discrimination in any respect in selecting these two agencies for this purpose in different cities.

"It is the duty and function of the legislature to discern and correct evils, and by evils we do not mean some definite injury, but obstacles to a greater public welfare. . . . And we repeat, 'it may make discriminations if founded on distinctions that we cannot pronounce unreasonable and purely arbitrary.' " *Rast v. Van Deman & Lewis Co.* 240 U. S. 342, 36 Sup. Ct. 370.

We discover nothing in this legislation resulting in a denial of the equal protection of the law or due process of law, nor does the act confer legislative power on persons or deprive any one of the right to redress legal wrongs by judicial review. It is considered that the trial court correctly held the law to be valid and properly vacated the restraining order entered against the defendants. The complaints allege that the fire and police commission arbitrarily and unjustifiably refused to approve the plaintiffs' application

for a license. This states a good cause of action, and the court improperly held that the demurrer to the complaint should be sustained.

By the Court.—The order appealed from is reversed, and the cause remanded with direction that the court enter an order in conformity with this opinion. Neither party to recover costs in this court, the appellant to pay the clerk's fees.

A motion for a rehearing was denied, without costs, on March 8, 1921.

MUCHLINSKI, Appellant, vs. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Respondent.

November 17, 1920—March 8, 1921.

Railroads: Injury to licensee: Negligence.

Uncontradicted evidence that warning signals were repeatedly sounded by a train running about eight miles an hour while passing through railroad yards and that the trainmen saw plaintiff, who was familiar with the yards, walking along the tracks in a place of safety until the train was almost upon him, when he started to cross the track upon which the train was approaching, is *held* to justify a directed verdict for the defendant railroad company on the issue of negligence, even if it be conceded that plaintiff was a licensee.

APPEAL from a judgment of the circuit court for Racine county: W. B. QUINLAN, Judge. *Affirmed.*

Action for damages for a personal injury. The trial court directed a verdict for defendant. From a judgment entered accordingly plaintiff appeals.

Appellant had been employed for some weeks prior to his injury in a factory adjoining the right of way of the respondent company in the city of Racine. He had been in the custom, as had many other employees of factories in the

neighborhood, of walking along the right of way in going to and from work.

There were several tracks in this area over which these workmen walked, one main track and several used for switching, storing cars, and for loading and unloading freight. This right of way was not, in general, fenced. It was disputed whether it was fenced from the factory in which appellant worked, and whether appellant entered it from a public street crossing or direct from the factory property. There were a few signs along the right of way stating that it was private property and bearing the direction to keep off. Appellant testified that he had not noticed them. Appellant was familiar with the fact that the tracks in this area were used quite frequently by trains and switch engines. He had observed this while walking along the way and from his working place in the factory. He was familiar with the fact that a train usually passed there about noon going easterly.

On the day of the accident, October 18, 1917, appellant was walking easterly along the tracks on his way to lunch shortly after 12 o'clock noon. He did not look to the rear when he entered the tracks to see if a train was approaching, nor did he look to the rear thereafter as he walked along. He was not paying attention to listening for whistle or bell; he thought that the train had already passed.

After appellant had walked along thus for a few blocks, the usual train, a light motor-driven passenger train, approached from the west. It whistled for each crossing and at other times. Its bell rang continuously. It was running about four to eight miles per hour. Appellant was then walking in a position of safety to the north of the main track upon which the train was approaching.

The engineer testified that when the train was less than 100 feet from appellant the latter veered over toward the main track, that he gave the danger whistle and applied the brakes, but that appellant walked in front of the train and

was struck. Appellant testified that he heard the whistle back of him, thought here comes the train, thought it was on his left rather than his right, was kind of scared, and jumped over upon the tracks to his right without looking to the rear; that then he heard another whistle and saw the train practically on him and that he jumped again, but too late. He received serious injuries.

Plaintiff offered testimony below that as he lay on the ground somebody he took to be the conductor asked him his name, and that a bystander then remarked to this person that the latter had not given appellant a fair chance, that he had whistled when right on top of him. This evidence was excluded at the time on the ground that the identity of the person to whom the remark was addressed was not established as being the conductor. Further identification was later established and the testimony theretofore excluded was either thereupon admitted by the trial court or plaintiff was given the opportunity to reintroduce it and did not do so.

When the evidence was closed the respondent moved for a directed verdict. The trial court, after stating certain of the facts, granted the motion.

For the appellant the cause was submitted on the brief of *Joseph G. Hirschberg,* attorney, and *Horace B. Walmsley,* of counsel, both of Milwaukee.

For the respondent there was a brief by *Thompson, Myers & Kearney* of Racine, attorneys, and *H. J. Killilea* of Milwaukee, of counsel; and the cause was argued orally by *P. J. Myers.*

The following opinion was filed December 14, 1920:

JONES, J. Plaintiff's counsel place much reliance on their claim that the plaintiff was a licensee and that the defendant owed a high standard of care to persons traveling on its right of way. The testimony showed that there were signs in large print reading "Private Property," "No Thoroughfare," "Keep Off," posted in prominent places in the yards.

The uses of the yard for loading and unloading merchandise and switching were such that it would not have been practicable to exclude persons who chose to enter them and travel along the track. The defendant seems to have adopted the only feasible course for giving warning of danger to persons coming upon the grounds.

But if it be conceded that the plaintiff was a licensee and that it was the duty of the company to exercise increased prudence and caution in operating its road and to keep a reasonably vigilant lookout to prevent injury to those using the grounds, still the proof falls short of showing defendant's negligence. There is no evidence that the train was going faster than eight miles per hour. The accident did not occur at any crossing. The usual conflict of evidence as to the ringing of the bell and the blowing of the whistle is wanting. The undisputed evidence shows that the bell had been ringing constantly for some time before, and up to the time of, the accident; that the whistle had been blown for all street crossings, every few blocks, and twice again as signals to the man operating the block system. These signals were heard by him at his post several hundred feet more distant than the place of the accident. The whistle was sounded again as soon as the engineer saw any indication that plaintiff might turn toward the track. The plaintiff was not a child but an adult, and the engineer had no reason to expect that he would suddenly turn from a place of safety to cross the track. It cannot be said that there was not a vigilant lookout to prevent injury, because the engineer saw the plaintiff some distance ahead traveling parallel to the track in a place of safety.

Although it is argued by appellant's counsel that the plaintiff became confused when he finally heard the whistle blown and jumped in the wrong direction to avoid injury, it is hardly claimed that the sounding of the whistle was a negligent act. The trial judge properly held that no negligence was established against defendant.

For about six weeks plaintiff had been in the habit of traveling on the defendant's right of way, and he was familiar with the situation and the use to which the grounds were put. The yards were busy places; switch engines were being used frequently and there were about twenty passenger trains a day. Plaintiff knew that a train generally passed to the east about the time of day when this accident happened, but he supposed it had passed. When he went upon the tracks of defendant he did not look to see if any train was coming. Although there was no obstruction to view, he continued walking along, neither looking, nor listening to the ringing of the bell nor the sounding of the whistle, until, when the whistle sounded the third time, he became confused, according to his own account, and jumped in the wrong direction from a place of safety to one of danger. According to the plaintiff's own showing he was walking beside a railroad track, paying no attention whatever to the coming or going of trains. He was at a place where if he had paid the slightest attention he would have heard the whistle and the ringing of the bell.

No claim is made by appellant's counsel that the tracks should have been fenced or that the absence of a fence or other guard in any way contributed to the injury.

The offered proof of a declaration by a bystander was of doubtful admissibility at best. In our opinion there was no error in the ruling of the trial court on that subject.

By the Court.—Judgment affirmed.

A motion for a rehearing was denied, with $25 costs, on March 8, 1921.

WELLER and another, Respondents, vs. PHILLIP GROSS REALTY COMPANY, Appellant.

November 18, 1920—March 8, 1921.

Brokers: Performance of contract: When commission is earned: Contract of sale not consummated: Statement by owner as to commission: Waiver of performance by broker: Estoppel: Unauthorized act of broker: Effect on commission.

1. In order to entitle a broker to recover his commission he must establish that he had produced a purchaser who was able, ready, and willing to purchase the property on the terms specified by the owner.
2. Where brokers were employed to sell a ninety-nine-year leasehold on terms stated in writing, which included conditions to conform to the present lease and to release the vendor from all liability and for the erection of a new building by the lessee, pending which a bond was to be deposited, an offer to purchase by the brokers' customer which contemplated no assignment of the lease until the new building was completed, and which required the vendor to remain the principal on all bonds, did not conform to the stated terms so as to entitle the brokers to their commission.
3. Brokers have earned their commission when the stated terms are accepted by their customer and the contract is closed; but they are not entitled to the commission where the stated terms were not accepted and the parties never agreed on other terms.
4. The owners' statement to the brokers that the latter had earned their commission, made when the owners believed the deal would be closed with the brokers' customer, expressed no intention by the owners to relinquish their right to resist payment of the commission if the customer was not willing to take the property under the terms stated to the brokers, and therefore did not waive that right.
5. The statement made by the owners to the brokers while negotiations with the brokers' customer were still pending, that the brokers had earned their commission, does not estop the owners from resisting payment of the commission after the negotiations fell through, in the absence of a showing of any acts by the brokers in reliance on the statement.

[6. Whether the unauthorized acceptance in writing by the brokers of an offer which was not in conformity to the owners' terms is such a palpable breach of duty towards the owners as to preclude a recovery by the brokers, not decided.]

APPEAL from a judgment of the circuit for Milwaukee county: JOHN J. GREGORY, Circuit Judge. *Reversed.*

This action was brought to recover a commission claimed to be due the respondents. The action was tried to the court and a jury. After the evidence was in, both parties moved for a directed verdict; thereupon the jury was dismissed, and the court made findings of fact and conclusions of law, pursuant to which judgment was entered for respondents in the sum of $10,517.89, from which judgment the defendant, appellant here, appeals.

The appellant is a corporation and owned a ninety-nine-year lease with the Jacobs estate, lessor, covering land known as No. 126–128 Grand avenue, Milwaukee, upon which property a store building occupied by the Phillip Gross Hardware & Supply Company was located. The Jacobs estate is the owner of the fee. The lease was signed November 9, 1911, and the term commenced January 1, 1912, and ended December 31, 2010. The rentals were made January 1, 1912, to April 30, 1915, $5,000 yearly, and for the remainder of the term $13,000 yearly, and the lessee was required to pay taxes and assessments on both land and improvements and water rents, etc., from the date of the lease. The lessee was also required by the terms of the lease to erect a new building at a cost of not less than $100,000 and complete the same before January 1, 1920, and to give a bond in the sum of $50,000 for the erection of a new building, which bond was to be secured by real-estate mortgage, which real estate was subject to a first mortgage of $12,500, the lessee having the right to substitute other security satisfactory to the lessor. Prior to the razing of the present building for the purpose of erecting a new one, the lessee was required to deliver to the lessor an additional bond of $50,000.

The Jacobs lease in question does not prohibit subletting, but does provide that assignment may be made without the

consent of the lessor upon certain conditions, one of which is the execution and delivery of a $50,000 bond to the lessor. The Jacobs lease also provides for a $100,000 bond on the destruction of the proposed new building.

For the appellant there was a brief by *Lawrence A. Olwell, Bernard V. Brady,* and *Olwell, Durant & Brady,* all of Milwaukee, and oral argument by *Lawrence A. Olwell.*

For the respondents there was a brief by *Benjamin Poss* and *Herbert E. Toelle,* both of Milwaukee, and oral argument by *Mr. Poss.*

The following opinion was filed January 11, 1921:

KERWIN, J. The appellant excepted to the findings of fact, and the main controversy in this case turns on whether the facts found by the court below are supported by the evidence.

A great amount of testimony was taken in the case, much of which had little bearing upon the questions at issue. That an agency to sell the property in question was created is not denied, but the vital question is, Did the plaintiffs produce a person ready and willing to buy the property in accordance with the terms of the agency?

1. The following facts appear to be established without substantial dispute: The defendant, *Phillip Gross Realty Company,* and the Phillip Gross Hardware & Supply Company were corporations whose stock was owned by Phillip Gross, his son, Arthur Gross, and his son-in-law, Chas. E. Mueller, all residents of Milwaukee. The defendant *Realty Company* owned as lessee a ninety-nine-year lease upon a piece of property on the north side of Grand avenue. The owners of the fee, lessors, were Jacobs and others of Madison, and are referred to in the testimony as the Jacobs estate, and the lease as the Jacobs lease.

In February, 1913, the hardware company occupied the building on the property covered by the Jacobs lease and the

Realty Company desired to dispose of that lease. The plaintiffs, *Weller* and *Brachman,* acted as agents for the *Realty Company* under the following contract of agency:

"Milwaukee, Wis., 1/14/14.

"*Mr. W. B. Weller,* City.

"Dear Sir: We hereby agree to lease the premises known as 126 and 128 Grand avenue—42½ x 100 feet—on the following terms and conditions:

"Rent to be $16,500 net per year to us for the balance of the term of ninety-nine (99) years as per lease now on said premises, payable quarterly in equal instalments, rent to start upon possession of present building. Conditions similar and to conform to present lease. Your parties must immediately, upon possession, commence erection of new buildings to cost not less than $100,000. During construction your people are to have an acceptable bond of $50,000 deposited with us until new building is erected. Taxes for first year to be adjusted.

"This proposition must be closed on or before February 16, 1913. Yours truly,

"PHILLIP GROSS REALTY COMPANY,
"Phillip Gross, President.
"Chas. E. Mueller, Secretary."

The agreement of agency is referred to in the printed case as Exhibit 1. Under the agency the plaintiffs sought to interest one Adolph Spiegel, who was in business in Milwaukee. Verbal proposals were carried back and forth between the *Realty Company* and Spiegel, and during the negotiations the *Realty Company* consented to a reduction of rent to $16,000 net per year.

The plaintiffs went to Spiegel with some concessions, and Spiegel's lawyer drew an instrument which purported to accept the verbal terms and was signed in the name of the Public Drug Company, a corporation controlled by Spiegel, and contained a blank space and appropriate wording for acceptance by the *Realty Company*. The plaintiffs took this writing to the *Realty Company* on February 15, 1913, and presented it together with a check of $1,000 which Spiegel

had given them to induce acceptance of a previous offer on his part. The following is a copy of the instrument of acceptance, referred to in the case as Exhibit 3:

"Milwaukee, Wis., February 15, 1913.

"*To the Phillip Gross Realty Company:*

Presented.

"Gentlemen: The undersigned accepts the proposition made on your behalf by *Mr. W. B. Weller* for the leasing of the premises known as 126 and 128 Grand avenue, Milwaukee, Wisconsin, and herewith delivers to *Mr. Weller* check for one thousand (1,000) dollars to bind the bargain. Rental to be sixteen thousand (16,000) dollars net per year during the term; term of lease to be for ninety-nine (99) years, commencing November 1, 1913, or before if you deliver possession after thirty days' written notice to that effect. One thousand (1,000) dollars herewith deposited with *Mr. Weller* to be applied toward the payment of the first month's rental; check to be held until form of agreements are agreed upon. Your present interest in the lease you have with Jacobs and Robbins dated the 9th day of November, 1911, to be assigned to the undersigned no later than January 1, 1919. On delivery of possession, twelve thousand five hundred (12,500) dollars to be deposited with you to be held in trust until after the completion of the building, which is to be erected before January 1, 1920; you to pay five (5) per cent. interest per annum on such sum of $12,500 from the time of its deposit, semi-annually, and the said $12,500 to be applied on the first year's rental after the completion of the said building.

"Taxes and insurance to be adjusted and prorated, lessee only to pay for the proportion of the year after possession.

"Lessee shall have the privilege of making repairs and alterations, and doing all things in connection therewith as if he were the owner of the present building.

"Yours, etc.,

"PUBLIC DRUG COMPANY,

"By Adolph Spiegel, President."

When this instrument, Exhibit 3, was presented to the officers of the *Realty Company* they refused to consider it until their attorney, Mr. Baker, had been consulted. After

Mr. Baker examined it he declared it too indefinite to warrant acceptance and advised that some instrument covering all the obligations to be assumed by each party should be executed. Mr. Baker, defendant's attorney, stated he could not do it that day, and it was suggested by *Mr. Weller,* plaintiff, that Mr. Gold, Spiegel's attorney, might do it. It was finally left to Mr. Gold to draw the paper.

On February 18, 1913, Mr. Gold submitted a draft of the proposed lease which did not meet the approval of Mr. Baker. Afterwards, on February 19, 1913, Mr. Baker submitted, at the solicitation of plaintiffs, a draft of a proposed lease, and on February 22, 1913, Mr. Gold submitted certain suggestions in the form of a letter, and on February 25, 1913, Mr. Gold and Mr. Glicksman submitted proposals with modifications. The matter of agreeing on "the form" of the lease or transaction had been left by the parties with their attorneys.

Nothing further seems to have been done by the parties to agree upon "the form" of lease or transaction at that time. In the language of counsel, the negotiations "were in a state of suspended animation—still alive, but not actively pressed."

Rumors came to Mr. Spiegel that the defendant was negotiating with other persons, whereupon Mr. Gold commenced an action for specific performance in favor of Mr. Spiegel and filed notice of *lis pendens.* While the specific performance action was pending Mr. Baker suggested that they continue negotiations, and drew and delivered to Mr. Gold a proposed escrow agreement, and assured Mr. Gold of the continued willingness of the *Realty Company,* defendant, to carry out in good faith the terms it had given to Spiegel.

Thereafter on January 9, 1914, Mr. Gold, without notice to Mr. Baker or the defendant, withdrew the specific performance suit and refused to resume further negotiations with the defendant or Mr. Baker unless the defendant would give his client an option for a definite period, so that his

client might go East and consult other parties whom he might wish to interest in the deal. This ended negotiations in the matter, and the defendant *Realty Company* was left with the lease on its hands.

After the day on which plaintiffs obtained the proposal from Spiegel the plaintiffs endeavored to hurry the matter along and made an effort to get Mr. Gold and Mr. Baker to conclude the deal, and in discussing the situation with the officers of the *Realty Company* the plaintiffs were told in effect that they had nothing to worry about; that they had earned their commission and the matter was up to the attorneys to be worked out.

After the specific performance action had been instituted Mr. Gold examined the plaintiff *Weller* as to what he would testify to in that suit, and *Mr. Weller,* without authority from the *Realty Company,* took the proposal of Spiegel (Exhibit 3) heretofore referred to, and indorsed thereon the following acceptance: "We agree to the foregoing. *Phillip Gross Realty Co.,* by *William B. Weller,* Agent," and delivered it to Mr. Gold, who retained it for the purpose of the specific performance suit. *Mr. Weller* admits that he had no authority to make this acceptance, and it will be observed from an examination of Exhibit 1, hereinbefore referred to, that said Exhibit 1 conferred no authority on plaintiffs to make a sale on the proposal of Spiegel. Under the agency contract with plaintiffs they were only authorized to make the sale with similar conditions to those contained in the Jacobs lease. True, there were one or two concessions made by the defendant to *Weller* during negotiations; for example, the rent was changed from $16,500 to $16,000, and probably one or two other slight modifications. But the contract between plaintiffs and defendant as finally settled and agreed under the undisputed facts in this case was as follows: Rent, $16,000 per year; term of the sale, entire balance of the ninety-nine-year lease; $50,000 building bond put up by defendant to remain for Spiegel's benefit; $12,500

cash deposit to be made and applied on first year's rental after completion of building; transfer to be made subject to all terms and conditions of the Jacobs lease, which were to be assumed by whoever took the lease; and the *Realty Company* released from all obligations thereof.

2. The vital question is whether Spiegel, who was, so far as this case is concerned, the Public Drug Company, was ready and willing to accept the terms specified by the *Realty Company*. In order to entitle the plaintiffs to recover here it was necessary for them to establish that they had produced a purchaser able, ready, and willing to purchase the property on the terms specified by the defendant, and the clear preponderance of the evidence in the case establishes the fact that Spiegel (the Public Drug Company) was not ready and willing to accept the terms specified by the *Realty Company,* and never did consent to carry out the deal on such terms. In fact there is little dispute in the evidence on this proposition.

The authority of plaintiffs to dispose of the defendant's interest in the lease was specified in writing and is set out in the case as Exhibit 1. The proposal which the Public Drug Company made was not in compliance with the terms specified by defendant, and these specifications, except in the particulars heretofore mentioned, did not comply with the authority conferred on the plaintiffs.

It appears from the clear preponderance of the evidence that the terms which Spiegel failed to assent to were those which the *Realty Company* and the plaintiffs agreed on as the terms fixed by the *Realty Company* on which it would deal. This plainly appears from the objections which Mr. Baker, attorney for the *Realty Company,* raised to the proposed lease drafted by Mr. Gold, attorney for Spiegel. Mr. Baker's objections were substantially as follows:

(1) Gold's draft contemplates no assignment of the lease until after the new building is erected. Baker objected to this because the terms the *Realty Company* had fixed, as

recognized in Spiegel's written acceptance, were that the assignment was to be made prior to January 1, 1919, which was before the erection of the new building.

(2) Gold's draft, being merely a sublease until the new building was completed and providing for an assignment to Spiegel thereafter, did not release the *Realty Company* from its obligations or responsibilities under the Jacobs lease.

(3) Gold's draft was a mere contract to take an assignment of the lease by Spiegel in the future, not a present assumption of the obligations.

(4) Gold's draft provided no means of securing under the leasehold estate the $3,000 per year due defendant in excess of rental to Jacobs with the assignment of the lease.

(5) Gold's draft required the *Realty Company* to be the principal upon all bonds required by the Jacobs lease on assignment of the lease or wrecking of the old building, and left Spiegel an option to furnish sureties on the bond or put up securities in lieu of sureties.

(6) Gold's draft provided for an immediate assignment of the lease to a trust company pending erection of the new building. Baker objected to this. In his opinion no assignment could be made except upon compliance with the Jacobs lease by putting up $50,000 bond.

It appearing that the Gold draft of lease did not accord with the terms the defendant had given *Weller* and which Spiegel claimed to have accepted, Baker drafted and submitted, at the request of *Weller*, a form of sublease which called for a term one day short of the ninety-nine-year term. Baker, however, subsequently had stated that after careful consideration he was convinced that this sublease would probably be considered an assignment and thus necessitate the bond required by the Jacobs lease on assignment prior to completion of building.

In his testimony Gold admitted that he insisted on the defendant remaining as principal on the assignment bond, and it seems that practically all the evidence of Mr. Gold

is to the effect that he required the defendant to be principal upon all bonds.

The testimony shows quite clearly that included in the terms which the *Realty Company* gave to the plaintiffs to dispose of the lease was that the lease must be taken off their hands entirely, and plaintiff *Weller* admits that he understood that his agency agreement required him to dispose of the *Realty Company's* entire interest in the lease, and Spiegel's acceptance purported to accept the terms the *Realty Company* had given plaintiff *Weller;* but Spiegel, while accepting the terms given to *Weller*, insisted upon conditions inconsistent with those the *Realty Company* had given *Weller*.

Mr. Gold was acting for Mr. Spiegel, and, while it is true there is some evidence on his part to the effect that Spiegel would adopt some conditions in addition to those set out in his proposal, in the same breath Mr. Gold testifies that he was acting for Spiegel and that his instructions would be followed by Spiegel in the matter of what the agreement should contain. The terms which Mr. Gold insisted upon to the last were in conflict with the terms fixed by the *Realty Company*. For example:

(1) Delay in assignment to Spiegel until completion of new building.

(2) Failure to provide immediate assignment to Spiegel and release of the *Realty Company*.

(3) Agreement by Spiegel to accept a future assignment *in præsenti*.

(4) Moneys due the *Realty Company* not secured on leasehold.

(5) Insistence that the *Realty Company* become obligated as principal on all future bonds.

(6) Provision for immediate assignment of the lease to a trust company, with no attempt to comply with terms of the Jacobs lease as to assignment.

The evidence all through, without any substantial dispute,

shows that Baker, on behalf of the *Realty Company,* endeavored to go as far as possible to comply with any reasonable demand made by Gold on behalf of Spiegel, for the purpose of bringing about a settlement of terms and conditions of the agreement upon which Spiegel might purchase.

The changes which Mr. Gold demanded from the authority conferred on the plaintiffs by the *Realty Company* were broad and sweeping, and in a case like the present, where the lease was to extend for so long a period and involved so many and such important and complicated questions, could not reasonably have been assented to and were not within the terms of the agency.

The giving of the $50,000 assignment bond and the matter of the *Realty Company* binding itself to become principal upon all bonds, and which were insisted upon by Mr. Gold to the last, alone are sufficient to show that the plaintiffs had not found a purchaser ready and willing to carry out the terms of the Jacobs lease and that Spiegel was not ready and willing to deal upon the terms the *Realty Company* had authorized *Weller* to make.

The action of Spiegel, through Mr. Gold, in commencing the specific performance suit on the strength of some alleged rumors of other parties being after the property, and the sudden discontinuance of such suit without notice until after he was out of court and all costs paid, was also a rather unusual circumstance, especially when the discontinuance of this suit was followed by a demand for an option to purchase the property and refusal to resume negotiations on any other basis.

It is not necessary to speculate as to why this unusual proceeding was taken. It is simply in line with many other proceedings in the case, some of which it is not easy to understand. It is true that notwithstanding Mr. Gold's persistent demands respecting this assignment bond, and other conditions, he had on one or two occasions during the trial stated in a general way that he thought or believed

that Spiegel would comply with the defendant's proposition.

There is also some evidence on the part of *Mr. Weller*, plaintiff, to the same effect; but when we come to consider this evidence in connection with all the evidence in the case, it is perfectly clear to the court that the great overwhelming weight of the evidence is to the effect that Mr. Spiegel never was ready and willing to take the property in accordance with the terms of the agency.

The good faith of the *Realty Company* in endeavoring to carry out the deal according to the terms of the agency first created, and even by going further and making some concessions, is manifest from the whole record, even while the specific performance action was pending. Mr. Baker, representing defendant, in a letter to Mr. Gold said, among other things:

"We believe that the parties should continue negotiations which were pending between them at the time the action was commenced, and that our client should give to your client a lease which would carry out as nearly as can be the understanding between the parties, which we insist had not yet reached the stage of an agreement."

Shortly after the receipt of this letter Mr. Gold discontinued the specific performance suit.

The whole record shows that Mr. Baker, representing the defendant *Realty Company*, made every effort that he reasonably could, under the contract between plaintiffs and defendant, to meet the demands of Mr. Gold, Spiegel's representative. The testimony shows that Baker took the affirmative in attempting to bring about an agreement, and went to Gold's office for that purpose, while Mr. Gold says that he never was in Baker's office on the matter.

Mr. Weller gives some evidence that Mr. Spiegel will do so and so. This evidence also is simply the opinion of *Mr. Weller* at best, and when we get down to the positive

testimony on the particular issues we find that the evidence is practically all against that theory, and to the effect that Spiegel and the defendant never agreed on the exact terms upon which Spiegel would take the property.

Considerable is made of the point that something was said to the effect that the plaintiffs need not worry, they had earned their commission, and that the deal was closed and nothing remained but to draw the formal contract. It is quite apparent that the plaintiffs and defendant did not fully understand the difference between the form of the lease and the terms. Of course, if the contract had been completed in its terms in every particular and nothing further left to be considered, no question having arisen as to whether the minds of the parties had met on the terms of the contract, there might be some force in the plaintiffs' position that their commission was earned when the contract was closed; but the difficulty in the present case is that the contract never was closed, according to the great preponderance of the evidence.

It must be considered that the remark with reference to plaintiffs having earned their commission was made on the theory that the deal would be closed. It is argued by respondents that the assurance coming from the defendant that plaintiffs need not worry and that they had earned their commission operates as a waiver of the defendant's right to insist on performance of the contract, and that the defendant is estopped from denying that the plaintiffs had earned their commission. This contention is without merit.

In order to bind the defendant on the ground of a waiver there must be, under repeated decisions of this court, intentional relinquishment of a known right, and it seems clear on the record that there was no intention on the part of defendant to relinquish the right to resist payment of commission in case the plaintiffs did not find a purchaser ready and willing to take the property under the terms of the

agency. *Dunn v. Superior,* 148 Wis. 636, 135 N. W. 145; *Monroe W. W. Co. v. Monroe,* 110 Wis. 11, 85 N. W. 685; *Swedish Am. Nat. Bank v. Koebernick,* 136 Wis. 473, 117 N. W. 1020.

Nor can there be an estoppel against the defendant asserting its rights on account of such remark. In order to constitute an estoppel the party relying thereon must show that he has acted or failed to act to his present disadvantage; has on account of such reliance or failure to act altered his position for the worse. There is no evidence sufficient to support a finding of waiver or estoppel in this case.

In the instant case the parties to the negotiations for the sale were represented by two very able lawyers of Milwaukee, Mr. Spiegel by Mr. Gold and the defendant *Realty Company* by Mr. Baker, and the matter of formulating the contract very carefully considered. Not only the form of contract but the rights, liabilities, and burdens of the parties were considered.

3. It is further contended by appellant that the plaintiff *Weller,* by deliberately and without authority signing the name of his principal, the *Realty Company,* defendant, in acceptance of Spiegel's written proposal after the specific performance action was instituted and delivering the same to Spiegel's attorney for the purpose of that suit, committed a gross and palpable breach of duty to the defendant, which, aside from all other considerations, precludes a recovery in this action.

This contention is vigorously presented in the brief of counsel for appellant and many decisions of this court are cited, amongst others the following: *Sicklesteel v. Edmonds,* 158 Wis. 122, 134, 147 N. W. 1042; *Sterling E. & C. Co. v. Miller,* 164 Wis. 192, 196, 159 N. W. 732; *Arthur Koenig Co. v. Graham G. Co.* 170 Wis. 472, 474, 175 N. W. 814, 815; *Weinhagen v. Hayes,* 174 Wis. ——, 178 N. W. 780, 183 N. W. 162.

In the view we take of this case it is unnecessary to pass upon this contention and we express no opinion upon it.

It follows from what has been said that the judgment of the court below must be reversed.

By the Court.—Judgment of the court below is reversed, and the cause remanded with instructions to dismiss the complaint.

A motion for a rehearing was denied, with $25 costs, on March 8, 1921.

MANDARIN COMPANY, Appellant, vs. TOY, Respondent.

November 18, 1920—March 8, 1921.

Landlord and tenant: Oral agreement by lessor to furnish heat and electricity: Revocation on notice to lessee.

Where a lease expressly exempted the landlord from furnishing the tenant electric and heat service, and an oral agreement under which he furnished it for a time to the tenant stipulated no definite period and the tenant was put to no expense in continuing to use it, such executory oral agreement, being revocable at will on reasonable notice, cannot be made the basis for a continuing duty on the part of the landlord to furnish electricity and heat.

APPEAL from an order of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

Action by a tenant to restrain the defendant, its landlord, from ceasing to furnish it electricity and heat. The court entered an order refusing to grant a temporary injunction, and from such order the plaintiff appealed.

For the appellant there was a brief by *Gugel & Kline* of Milwaukee, and oral argument by *F. H. Gugel.*

For the respondent there was a brief by *Stover & Stover* of Milwaukee, and oral argument by *Daniel G. Stover* and *James H. Stover.*

The following opinion was filed December 14, 1920:

VINJE, J. October 2, 1916, plaintiff leased the north one-half and the sixth floor of a building from defendant for a term of sixty years. The lease contained the following provisions: "Lessor agrees to furnish lessee cold water for use in the said premises, but no hot water, steam, electricity, gas, compressed air, or heat." At the time the lease was entered into, the building was heated and lighted by pipes and wires installed in the building and connected with an electric company's service. About a month after the lease was made plaintiff negotiated with the electric company for heat and light but found it would cost more than through the defendant's system, so an oral agreement was entered into between them whereby defendant was to furnish heat and light but for no definite length of time. Plaintiff was not called upon to make any investment in fixtures or otherwise by reason of continuing to take heat and light under the oral agreement.

October 6, 1919, the defendant gave plaintiff notice that he would discontinue electric service October 31, 1919, and that heat service would be discontinued November 30, 1919, and gave the tenant permission to make necessary changes in building to install new electric and heat service. It seems that plaintiff was in arrears on its payments for heat and light service, and that by reason of plaintiff having partitioned the sixth floor into offices much more heat was needed, more than the defendant could furnish with his equipment. Plaintiff claims defendant had no right to discontinue heat and light service. In view of the express conditions of the lease exempting him from furnishing such service he cannot be compelled to do so by virtue of the lease. The oral agreement being executory, and plaintiff having been to no expense in continuing to use it, cannot be made the basis for the duty. Such agreement was revocable at will upon giving reasonable notice. It is not claimed or shown that the notice given was not reasonable.

The trial court therefore properly refused to grant a temporary injunction.

By the Court.—Order affirmed.

A motion for a rehearing was denied, with $25 costs, on March 8, 1921.

JOHNSTON and another, Appellants, vs. CITY OF WEST ALLIS, Respondent.

November 19, 1920—March 8, 1921.

Appeal and error: Affirmance by divided court.

Where the justices of the supreme court are equally divided in opinion on the question involved on an appeal, the judgment appealed from will be affirmed.

APPEAL from a judgment of the circuit court for Milwaukee county: GUSTAVE G. GEHRZ, Circuit Judge. *Affirmed.*

In 1917 the council of defendant city made an assessment of damages against the two plaintiffs as abutting property owners on National avenue in said city for a portion of the expenses incurred in then placing a new wearing surface upon an existing concrete base which had been constructed in 1912.

Upon appeal to the circuit court the assessments were upheld, and from a judgment confirming the same the several plaintiffs have appealed to this court.

For the appellants there was a brief by *Lines, Spooner & Quarles* of Milwaukee, and oral argument by *Charles B. Quarles.*

Joseph E. Tierney, city attorney, for the respondent.

The following opinion was filed December 14, 1920:

ESCHWEILER, J. Mr. Justice KERWIN did not participate in the hearing and decision of this case. Mr. Chief Justice SIEBECKER, Mr. Justice VINJE, and Mr. Justice

OWEN are of the opinion that the judgment of the circuit court should be affirmed. Mr. Justice ROSENBERRY, Mr. Justice JONES, and the writer are of the opinion that it should be reversed. This under the rule requires an affirmance of the judgment. *Estate of Carter,* 167 Wis. 89, 166 N. W. 657.

By the Court.—The judgment of the circuit court is affirmed.

A motion for a rehearing was denied, without costs, on March 8, 1921.

WILL OF DALRYMPLE.

December 14, 1920—March 8, 1921.

Wills: Construction: Distribution per capita or within classes: Time of distribution: Discretion of trustees: Vesting of estate: Right to accumulations after interest vests.

1. Under a clause in testator's will whereby he directed that the balance of his estate be distributed in equal shares "to the then living children or lineal descendants by right of representation of my six brothers," naming them, it was testator's intention to distribute his residuary estate per capita among the then living children of the named brothers, the lineal descendants of any deceased child to take the parent's share by right of representation.
2. Where the will provided for distribution of testator's estate at the expiration of ten years after his decease, or at such time or times after said ten years, but prior to the expiration of twenty years, from his decease as his executors and trustees or their successors should deem expedient or advisable, the testator gave to the executors and trustees a discretion as to the distribution of his estate within the period limited, with the right to make partial distribution thereof as circumstances might warrant.
3. The will having invested testator's executors and trustees with discretion as to the time when they should distribute the estate, the remainder of the estate will vest at the expiration of the twenty-year period wherein distribution is discretionary with the executors, or at such prior time or times as the executors and trustees may, in their discretion, fix for its distribution.

4. The fund distributed to testator's beneficiaries being part of his residuary estate, and the right thereto in the beneficiaries having vested with the filing of the petition for distribution by the executors, the beneficiaries or legatees are entitled to the accumulations of the fund in the interim.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Reversed.*

Construction of will. William F. Dalrymple, bachelor, died July 21, 1901, at the age of seventy-six years. The testator had seven brothers and one sister, David, Mark, Reuben, Clark, Oliver, Noah, Sheldon N., and Mary Ann D. Acocks. David and Sheldon N. and Mary Ann died prior to June 18, 1898, the day on which the testator executed his will. Noah and Mary Ann died without leaving any children. All of the testator's brothers were farmers, and, with the exception of Oliver and Sheldon, lived and died in Pennsylvania. The testator was the owner of the celebrated Dalrymple ranch in Dakota, considerable property situated in Bayfield county, Wisconsin, and some property in the state of Pennsylvania. He usually passed his summers in Wisconsin and his winters in New York or Pennsylvania. In his will the testator gave to each of his five surviving brothers $5,000. He then made specific bequests to his nephews, nieces, and a grand-niece, as follows:

"Silas A. Dalrymple, five thousand ($5,000) dollars (the said Silas being the son of Mark Dalrymple); William F. Dalrymple, son of Oliver Dalrymple, five thousand dollars ($5,000); John S. Dalrymple, son of Oliver Dalrymple, five thousand dollars ($5,000); Oliver C. Dalrymple, son of Clark Dalrymple, forty-five hundred dollars ($4,500); John C. Dalrymple, son of Clark Dalrymple, forty-five hundred dollars ($4,500); Oliver H. Dalrymple, son of Sheldon N. Dalrymple, three thousand dollars ($3,000); Mrs. Emma Dalrymple, daughter of Sheldon N. Dalrymple, three thousand dollars ($3,000); David N. Dalrymple, son of Sheldon N. Dalrymple, three thousand dollars ($3,000); Charles C. Dalrymple, son of Sheldon N. Dalrymple, three thousand dollars ($3,000); Mrs. Mariette Dalrymple Harper, daugh-

ter of Mark Dalrymple, two thousand dollars ($2,000); Mrs. Mattie Dalrymple Walton, daughter of Mark Dalrymple, two thousand dollars ($2,000); Mrs. Kate Dalrymple Nichols, daughter of David Dalrymple, five hundred dollars ($500); Mrs. Richard Dalrymple Woodside, daughter of David Dalrymple, two thousand dollars ($2,000); Mrs. Minnie Bell Dalrymple Foss, daughter of Sheldon C. Dalrymple, deceased, five hundred dollars ($500); Mrs. Elizabeth Dalrymple Eames, daughter of Mark Dalrymple, five hundred dollars ($500); Mrs. Alice Dalrymple Dorn, daughter of Mark Dalrymple, five hundred dollars ($500); Mrs. Ada Dalrymple Smith, daughter of Mark Dalrymple, five hundred dollars ($500); Mrs. Viola Dalrymple Fry, daughter of Mark Dalrymple, five hundred dollars ($500); William C. Dalrymple, son of Mark Dalrymple, five hundred dollars ($500); Grant O. Dalrymple, son of Mark Dalrymple, five hundred dollars ($500); Alton R. Dalrymple, son of Reuben Dalrymple, five thousand dollars ($5,000); Clifton G. Dalrymple, son of Reuben Dalrymple, five hundred dollars ($500); Clark C. Dalrymple, son of Reuben Dalrymple, five hundred dollars ($500); and to Mrs. Loranda Dalrymple Brooks, daughter of Clark Dalrymple, five hundred dollars ($500); the payment of each and every of the above mentioned sum in this item to be made by my said executors and trustees or their successors in the trust at such time or times after the expiration of ten (10) years from the date of my death as they shall deem advisable."

In addition he gave to his nephew, Frank H. Dalrymple, a farm in Pennsylvania. He then created a trust "for and during the term of ten (10) years from the date of my decease and for such longer time not exceeding twenty (20) years from my decease as they [executors and trustees] shall deem necessary or advisable for the purpose of maintaining, operating, improving, and developing the properties, rights, and corporation" in Bayfield county, and then gave certain directions as to the management of the trust. The will then provided:

"At the expiration of ten (10) years after my decease or at such other time or times after said ten (10) years but prior to the expiration of twenty (20) years from my decease as my said executors and trustees or their successors

in the trust shall deem expedient or advisable and for the best interest of my estate, I direct that all the said balance of my estate, together with all proceeds of the sale thereof and all interest, income, accumulations thereof then remaining in their hands except the above mentioned specific devises and bequests, be by them paid over, delivered, and distributed as follows, to wit: in equal shares to the then living children or lineal descendants by right of representation of my six brothers, to wit: David Dalrymple, Mark Dalrymple, Reuben Dalrymple, Clark Dalrymple, Oliver Dalrymple, and Sheldon N. Dalrymple."

The will was admitted to probate, the property was managed and controlled by the executors and trustees, the specific legacies were paid, and on September 20, 1917, the executors and trustees had on hand assets of approximately $200,000 in value. One hundred thousand dollars was represented by a balance due on a land contract for the sale of the Bayfield property. On September 20, 1917, the executors and trustees filed a petition in the county court of Milwaukee county asking for the distribution of the sum of $80,000 then in their hands. The petition presented four questions for the consideration of the county court: First, Did the language be "delivered and distributed as follows, to wit: in equal shares to the then living children or lineal descendants by right of representation of my six brothers, to wit: David Dalrymple, Mark Dalrymple, Reuben Dalrymple, Clark Dalrymple, Oliver Dalrymple, and Sheldon N. Dalrymple," require the division of the estate, or that part of it ready for distribution, into six parts and distribution among the then living children of the brothers named by right of representation, or were the executors and trustees required to divide the estate, or that part ready for distribution, into twenty-eight equal parts, each of the then living children taking one of such parts, the lineal descendants of any deceased child of a brother to take its parent's share by right of representation? Second, Did the will permit of successive distributions, or, under the will, could there be but one distribution? Third, When did the estate vest?

Fourth, Should the legatees receive interest upon their respective shares from the time of the distribution proposed by the executors and trustees?

The county court was of the opinion that the estate should be divided into six equal parts, each of which parts should go to the then living children of the brothers named by right of representation; second, that the executors and trustees were authorized to make distribution from time to time as funds were available; third, that the estate did not vest until actual distribution thereof by the executors and trustees; fourth, that the legatees should take their respective shares in the $80,000 proposed to be distributed without interest. On appeal to the circuit court, that court, by its decree, affirmed the decree of the county court, made formal findings of fact and conclusions of law, and from the judgment entered thereon the appeal to this court is taken.

Briefs were filed by *Louis Quarles* of Milwaukee, guardian *ad litem* for *Helen G. Foss, Richard D. Foss,* and *Ella N. Alexander;* by *Carl F. Geilfuss* of Milwaukee, guardian *ad litem* for *Florence D. Ferguson;* by *Miller, Mack & Fairchild* of Milwaukee, attorneys for the executors and trustees; by *Benjamin Poss* of Milwaukee, guardian *ad litem* for *David Watson Dalrymple;* by *J. W. McMillan* of Milwaukee, attorney for *Grant O. Dalrymple* and *Ernest A. Tullis;* and by *Bottum, Bottum, Hudnall & Lecher* of Milwaukee, attorneys for *William Dalrymple;* and the cause was argued orally by *Mr. Edwin S. Mack, Mr. Quarles, Mr. McMillan,* and *Mr. Geo. B. Hudnall.*

The following opinion was filed January 11, 1921:

ROSENBERRY, J. The principal question in the case is the construction of the language found in paragraph 8 of the will: "in equal shares to the then living children or lineal descendants by right of representation of my six brothers, to wit: David Dalrymple, Mark Dalrymple, Reuben Dalrymple, Clark Dalrymple, Oliver Dalrymple, and

Sheldon N. Dalrymple." It is the contention of the executors and trustees and a considerable number of the legatees that if the words in this clause are considered in the order of their sequence and natural meaning the residue is to be divided into twenty-eight equal parts; that any other construction results in words being superfluous and in words being given a double meaning; that the construction contended for follows the rule that an heir at law is to be favored in construing a will. It is the contention of respondents that if the language be construed in the light of the surrounding facts and circumstances, it appears that it was the intention of the testator that equality should begin with his brothers rather than with his nephews and nieces; that the reason for passing the living brothers was that they were then of advanced age; that if the language be construed as contended by the executors and trustees, the words "lineal descendants" could not apply because there could be no lineal descendants of "the then living children," and that the words "in equal shares" mean that the respective classes should take in equal shares, and not that each of the nephews and nieces should take in equal shares. Reference is made by both parties to sec. 2275, Stats.:

"Inheritance, or succession by right of representation, takes place when the descendants of any deceased heir take the same share or right in the estate of another person that their parent would have taken if living; posthumous children are considered as living at the death of their parents."

A considerable number of cases have been cited to our attention. We have before us the opinion of the trial court, which has received our careful consideration. The problem presented is one difficult of solution and no conclusion can be reached with such demonstrable certainty as to eliminate all doubts.

It is conceded on all sides that the intention of the testator must govern. We are aided very little by the evidence as

to the surrounding facts and circumstances. The testator was a man of large wealth, of unusual business ability and sagacity, and his will was prepared by a lawyer long eminent in the practice of his profession in this state. If we consider the relative circumstances of the various families, we find that by the specific legacies the testator gave to the children of Mark, ten in number, an aggregate sum of $12,000; to the children of Reuben, three in number, the aggregate sum of $6,000; to the children of Clark, three in number, $9,500; to the children of Oliver, two in number, $10,000; to the children of Sheldon, five in number, $12,500; to the children of David, five in number, $2,500. While this summary is of little help, it does indicate that he did not intend to treat his nieces and nephews equally as between families. If the summary is of any value, it would seem to indicate that having provided generously for the children of Oliver, for instance, he would not, without some strong reason, give each of them five times as much as each of the children of Mark would receive if the will be construed as contended for by respondents. But we do not regard this circumstance as controlling. Our conclusion is based rather upon the language of the will itself. The language in any view is more or less elliptical. We are of the opinion that it was the intention of the testator to distribute the residuary estate in equal shares among the then living children of the brothers named, the lineal descendants of any deceased child to take the parent's share by right of representation; that it was the intention of the testator that if any of his nieces and nephews should die before the distribution of his estate, leaving children, such surviving children should take the share of the deceased parent. The testator's brother Oliver was born August 21, 1830, and was the youngest of the surviving brothers who had children. At the time of the making of the will Oliver was sixty-eight years of age, Clark seventy-one, Reuben seventy, and the testator seventy-three. There was

every prospect that some of his brothers who had children would survive the testator. While, of course, there are exceptions, the words "by right of representation" are usually used in connection with the right of legatees to take through a deceased ancestor. There being every prospect that there might be some of his brothers surviving and some not surviving, there being one such case at the time of the making of the will, the language used would not be apt to express the intent of the testator if he intended that his nephews and nieces should take by right of representation through the brothers, as some of the brothers would, in all probability, survive the testator. Taking the words of the testator in their natural sequence, giving the language used its ordinary meaning, we think it was the intention of the testator, that his estate should be divided per capita among the then living children of his deceased brothers, the lineal descendants of any deceased child to take its parent's share by right of representation. There is nothing in the surrounding facts and circumstances sufficient to require a different construction. While the phrase "lineal descendants" might have been used so as to refer more clearly to the descendants of a deceased child, we think it much clearer that the phrase was intended to refer to a deceased child rather than to a deceased brother.

Second and Third, the will provided: "At the expiration of ten (10) years after my decease or at such other time or times after said ten (10) years but prior to the expiration of twenty (20) years from my decease as my said executors and trustees or their successors in the trust shall deem expedient or advisable and for the best interest of my estate, I direct," then follow words for distribution of his estate. We are of the opinion that by the use of the words "time or times" the testator intended to and did give to the executors and trustees a discretion as to the distribution of his estate within the period limited, with the right to make partial distribution thereof as the circumstances might

warrant. We are of the opinion, therefore, that as to the $80,000 the right thereto became vested upon the filing of the petition of the executors and trustees on September 20, 1917. As to that sum the administration was complete. Their discretion upon the filing of the petition had been exercised. It was thenceforth a matter for the court.

Margaret Foss Tullis, a daughter of Minnie Belle Foss, one of the legatees, died November 19, 1917, intestate, leaving no issue, and leaving her surviving her husband, *Ernest Tullis,* and her sister, *Helen G. Foss,* and her brother, *Richard D. Foss,* and no other heirs at law or next of kin. That part of the estate ready for distribution having vested as of the 20th day of September, 1917, and Margaret Foss Tullis leaving no issue, under the law of this state her right in the estate of the testator passed to her husband, *Ernest Tullis,* upon her death.

In this connection, we may say that in our opinion the remainder of the estate will vest at the expiration of the twenty-year period or at such prior time or times as the executors and trustees may, in their discretion, fix for the distribution thereof.

Fourth. The fund being distributed being a part of the residuary estate and the right thereto having vested with the filing of the petition September 20, 1917, the legatees are entitled to the accumulations of the fund in the interim. The ordinary rule as to specific legacies bearing interest does not apply.

By the Court.—Judgment reversed, and cause remanded with directions to the circuit court to enter judgment in accordance with this opinion.

On March 8, 1921, a motion for a rehearing was denied, without costs, and the mandate modified to read as follows:

By the Court.—Judgment reversed, with directions to the circuit court to enter judgment as indicated in the opinion of this court, each appellant to tax disbursements, including

printing, the appellants *William Dalrymple* and *Florence D. Ferguson* to tax in addition clerk's fees; and it is ordered that all disbursements so taxed shall be paid out of the estate of William F. Dalrymple, deceased.

BERRY, Appellant, vs. DIRECTOR GENERAL OF RAILROADS, Respondent.

December 15, 1920—March 8, 1921.

Railroads: Federal employers' liability act: Inspection of cars received by one carrier from another: Negligence.

1. The federal employers' liability act of April 22, 1908 (35 U. S. Stats. at Large, 65, ch. 49), does not require a carrier receiving cars from another carrier to sever integral parts of a car in order to discover possible decay or corrosion within, and a failure to so do does not render the carrier liable for an injury to an employee caused by a hidden defect.
2. A railroad company is not bound to inspect cars for defects when they are delivered to a car repairer for restoration; and though he was injured when the transom on which rest the sills of a refrigerator car fell, the car having been jacked up preparatory to the removal of the transom, there can be no recovery under the federal act, notwithstanding the sills and bolts holding the transom were defective.

APPEAL from a judgment of the circuit court for Milwaukee county: WALTER SCHINZ, Circuit Judge. *Affirmed.*

Action under the federal employers' liability act to recover for personal injuries sustained by plaintiff while repairing a car engaged in interstate commerce. The car belonged to the Northern Pacific Railway Company, and while in defendant's possession as operator of the Chicago & Northwestern Railway Company during the government's control thereof needed radical repairs because the drawbar had been pulled out, one of the draft timbers was missing, and a piece was broken off from the end of the other one. One sill to which the draft timber was attached was broken off and the other one was split a little. Plaintiff, who was a piece

worker, was required to repair the center sills and draft timbers. The description of the car is thus summarized by counsel for plaintiff:

"This refrigerator car consisted of the usual wooden box or body resting on front and rear trucks. The floor of this car was laid on 6 x 9 wooden sills running parallel and lengthwise. There were six of these sills laid as follows: one running along each side, called the side sills; two running down the center, called the center sills; and one between each of the side and center sills, called the intermediate or intersills. The floor was laid on these sills much like boards are nailed onto stringers in a board walk. Under the two center sills and bolted up tight against them were two draft timbers about 6 x 10 extending beyond the ends of the car, and onto the ends of which the coupler was attached. The body of the car, instead of resting directly on the trucks, rests on a transom, the lower end of which has a center-plate which rests on another center-plate fastened to the truck bolster. This transom is made of iron or steel and weighs from 600 to 1,000 pounds. The top of the transom on which the body of the car rests is straight and extends from side to side of the car. The sides of the transom slant inward to the center of the truck where it rests in the truck bolster, so that when the transom is in position it is somewhat triangular in shape, the body of the car resting on the upper side of the triangle and the apex resting in the body bolster of the truck. This transom is fastened to the sills by means of three-fourths inch bolts about sixteen to eighteen inches long. It is bolted onto the side sills by what is known as transom bolts running through each side sill and the flange of the transom, and body rod bolts running from the top of the car down through the side sills and the flange of the transom. Then there is a bolt running through each of the intersills and the flange of the transom and two center-plate bolts through each of the center sills and the transom. Ten bolts in all. The heads of the bolts are on the upper side or top of the sills and the nuts on the under side of the flange of the transom. While the draft timbers are bolted onto the center sills and not onto the transom, they are framed so that they pass through openings in the transom and thereby help to give it support. The space between the sills and below the regular floor of the car was covered with boards,

thereby making a double flooring, and between these boards and the regular floor was a composition of hair and paper. This arrangement was called the insulation and was used to prevent the heat from penetrating the car, thereby keeping the temperature in the car at a low degree. This insulation is right across the bottom of the sills, making a solid bottom underneath the sills, so that when you look up at the car from underneath it is a solid floor."

Plaintiff proceeded to jack up the car, loosen the bolts in the transom sufficiently to permit one end to be lowered so that they could put in splices, and repair the damaged center sills and draft timbers. While in the act of so doing, owing to the decayed or split condition of the sills or to the corroded threaded ends of the bolts permitting the nuts to slip, or to two or more of these causes combined, the bolts partly pulled through the center sills and permitted the transom to fall on plaintiff and injure him. Plaintiff claimed defendant was negligent in permitting the car to be sent to plaintiff for repairs in such decayed and split condition; that he should have inspected the car, discovered its true condition, and warned plaintiff thereof. The defendant contended there was no negligence on his part and that the plaintiff assumed the risk. At the close of plaintiff's testimony the court granted a motion for a nonsuit on the ground that plaintiff had assumed the risk, and from a judgment entered accordingly plaintiff appealed.

For the appellant there was a brief by *Schmitz, Wild & Gross* of Milwaukee, and oral argument by *Edward J. Gross* and *Robert E. Wild.*

For the respondent there was a brief by *R. N. Van Doren,* and oral argument by *D. E. Riordan,* both of Milwaukee.

The following opinion was filed January 11, 1921:

VINJE, J. The law under which recovery is sought, sec. 1 of the act of April 22, 1908 (35 U. S. Stats. at Large, 65, ch. 49), provides in substance that every common carrier by railroad while engaged in interstate commerce shall be

liable in damages to any person suffering injury while he is employed by such carrier in such commerce where such injury results in whole or in part from the negligence of such carrier or by reason of any defect or insufficiency due to its negligence in its cars, etc. It will be seen that recovery is contingent upon proof of negligence on the part of the carrier. Here the carrier's negligence claimed is the failure to inspect the car, discover the decayed condition of the sills and corroded state of the bolts, and disclose such decayed and corroded conditions to plaintiff before he was set to work upon the car. Discussing the subject upon the question of contributory negligence plaintiff's counsel say:

"After the transom came down it was found that the bolts stripped because of their corroded condition, and the tops of some of the sills were so badly decayed that the bolts pulled through from four to five inches of the decayed matter. Because of the construction of the car as described and the fact that the sills were decayed from above the plaintiff could not by the exercise of ordinary care know of this condition; neither could he know that the bolts were corroded within and above the nuts because they were hidden from view."

The above we think is a fair statement of the situation, though defendant claims there was no decay or corrosion but only a split visible in the sills. Since the sills and bolts were covered above by planks or boards forming the floor of the car, and were also covered below by the insulation, it is apparent that no inspection of the same could be made without taking this part of the car to pieces. We shall not here attempt to state the federal rule as to the duty of one carrier to inspect cars coming to it from another carrier, further than to state that such rule does not require the severing of integral parts of the car in order to discover possible decay or corrosion within. *Nelson v. Southern R. Co.* 246 U. S. 253, 38 Sup. Ct. 233, 62 L. Ed. 699. A rule requiring that would almost wholly arrest interstate commerce. It is therefore apparent that any reasonable

inspection made by defendant would not have disclosed the alleged defect. Hence, no injury resulting in whole or in part from any negligence of the defendant has been shown. Besides, whatever duty defendant owed its employees who were in the active operating service where cars and appliances are presumed to be in a reasonably safe state of repair for such service, it owed no duty to a car repairer, for when cars come to him it is because they are defective and he is to remedy the defect, and in doing so conditions constantly change. *Strehlau v. John Schroeder L. Co.* 142 Wis. 215, 125 N. W. 429; *Brown v. Conners*, 149 Wis. 403, 135 N. W. 857; *Rosholt v. Worden-Allen Co.* 155 Wis. 168, 144 N. W. 650. In the instant case there is no claim that plaintiff was misled by the directions as to the needed repairs, and it is conceded that he had the choice of method of making them and was furnished adequate tools, appliances, and help for the repairs to be made. Regrettable as the injury to plaintiff is, we find no neglect of duty on the part of defendant and so do not reach or decide the question of plaintiff's assumption of risk.

By the Court.—Judgment affirmed.

A motion for a rehearing was denied, with $25 costs, on March 8, 1921.

FIRST WISCONSIN TRUST COMPANY, Executor, Respondent, vs. SCHMIDT, Appellant.

December 16, 1920—March 8, 1921.

Automobiles: Injury to pedestrian at street intersection: Death: Uncontradicted testimony of party: Effect where inconsistent with other evidence: Damages to minor child from death of mother: Elements: Interest on items of expense: New trial: Accepting reduction of damages: Waiver of right to review.

1. The rule that the undisputed reasonable evidence of one witness, though a party to the action, should have controlling weight in determining a question of fact, does not apply to

the testimony of defendant as to the accident in which plaintiff's decedent was killed, where many facts and circumstances did not accord with defendant's testimony, though no witness denied his statements. *Feyrer v. Durbrow*, 172 Wis. 71, distinguished.

2. On defendant's appeal from the judgment, plaintiff cannot complain of the order of the court requiring a remission of part of the damages awarded as a condition of denying defendant's motion for new trial, where plaintiff had accepted the provisions of the order, his remedy being to refuse to remit and to appeal from the order granting the new trial.
3. In an action for the death of a widow who left two daughters, one a minor, the evidence is *held* sufficient to support a judgment for $1,500 as damages, though there was but slight evidence showing financial contributions by deceased to her children.
4. Damages may be allowed for the loss of the training, care, and education which the daughters could expect from their mother, and for which they would pay if they procured them from another, though there can be no recovery for loss of society.
5. Expenditures for the services of a physician, hospital services, and funeral expenses are items of damage caused by personal injury resulting in death, but they are not liquidated until the amount is determined by the verdict; and it was error for the court to allow interest on the amount of such expenditures upon a stipulation by the parties fixing the amount.

APPEAL from a judgment of the circuit court for Milwaukee county: E. T. FAIRCHILD, Circuit Judge. *Modified and affirmed.*

Personal injury. This action is brought by the executor of the estate of Alvina Schilke, widow, to recover damages for personal injuries sustained by her and for her death resulting therefrom.

The jury found, first, that defendant's automobile was, at and immediately prior to the accident, being run at a greater rate of speed than was reasonable and proper, having regard to the width, traffic upon, and use of Twelfth street in the vicinity of the accident; second, that such rate of speed was the proximate cause of the injury to the deceased; third, that the deceased was not guilty of contributory negligence; fourth, awarded damages for pain and

suffering, $750; and fifth, awarded damages for pecuniary loss sustained by the children of the deceased, $2,250. There were the usual motions on the part of the defendant. The trial court denied all the motions, except that an order was entered granting a new trial unless the plaintiff consented to remit the sum of $750 from the amount awarded as pecuniary damages sustained by the children of deceased. The plaintiff elected to make the remission. Judgment was entered for $2,250 and the further sum of $458.02, being $407.50 paid out for medical care and funeral expenses, with interest. From the judgment so entered the defendant appeals.

For the appellant there was a brief by *Lines, Spooner & Quarles,* and oral argument by *Leo Mann,* all of Milwaukee.

For the respondent there was a brief by *Clarence W. Bradford* and *Edgar L. Wood,* both of Milwaukee, and oral argument by *Mr. Bradford.*

The following opinion was filed January 11, 1921:

ROSENBERRY, J. Twelfth street in the city of Milwaukee runs north and south and intersects Prairie and Chestnut streets running east and west at right angles, Chestnut street being one block north of Prairie street. Between 7:30 and 8 o'clock on the evening of December 7, 1917, the defendant was driving his automobile south on Twelfth street. It was a clear moonlight night. The headlights on the defendant's automobile were burning. On Twelfth street there are two car lines, the north-bound cars running upon the easterly tracks and the south-bound cars running upon the westerly tracks. The deceased lived at 1222 Prairie street, between Twelfth and Thirteenth streets and west of Twelfth street. She had alighted from a north-bound street car, which had stopped at the usual stopping place on the northeast corner of Twelfth and Prairie streets, and while crossing Twelfth street from east to west to go to her home was struck by defendant's automobile which

he was driving south on Twelfth street on the west side of the street. There were with the defendant in his automobile at the time of the accident Miss Jungkert, Mrs. Triebel, Mrs. Toat, and Mrs. Amt. As the defendant drove across Chestnut street he saw the street car stop at the usual stopping place at the northeast corner of Twelfth and Prairie streets. The street car then started up and met defendant's automobile about midway between Prairie and Chestnut streets. When the defendant's automobile passed the north-bound street car defendant saw the deceased at the corner of Twelfth and Prairie streets on the east side of the street. It is the contention of the defendant that he slowed down his automobile until within a distance of thirteen or fourteen feet from deceased, when deceased stopped, indicating that she wished him to pass, his language being, "I was positive sure that the lady wanted to let me pass by." It is the contention of the defendant that the deceased darted in front of his car, that he then attempted to turn to the left, although his testimony upon this point is confusing, that she was struck by the edge of the right or westerly fender. Had the deceased gone a few inches farther the accident would have been avoided. There is considerable conflict in the evidence as to the location of the body after the accident. The defendant fixes it at a point near the north curb of Prairie street; other witnesses place it at a point near the south curb of Prairie street, some ten or twelve feet west of the west line of Twelfth street. It is the contention of the defendant upon this appeal that the rate of speed at which the defendant was driving his car was not the proximate cause of the accident; that the proximate cause was the unexpected, swift movement of the deceased in attempting to pass ahead of the automobile after indicating that she intended to wait until the automobile had passed her. The defendant cites *Burnham v. Norton*, 100 Wis. 8, 75 N. W. 304; *Marchand v. Bellin*, 158 Wis. 184, 147 N. W. 1033; *Johnson v. Ætna L. Ins. Co.*

158 Wis. 56, 147 N. W. 32, to the proposition that the undisputed, reasonable evidence of one witness, though a party to the action, should have controlling weight in determining a question of fact. We do not think the cases cited are applicable to the situation presented by the facts in this case. While no witness denied the statements of defendant, there was much evidence that tended to dispute the testimony of the defendant. Many facts and circumstances appearing in the case do not accord with defendant's testimony. There was a conflict in the evidence and therefore a jury question was presented. We shall not attempt to set out the evidence in full, but we have carefully examined it and are satisfied that the trial court committed no error in permitting the verdict of the jury to stand. This case is clearly distinguished from *Feyrer v. Durbrow,* 172 Wis. 71, 178 N. W. 306. In that case the physical facts established tended to support rather than disprove or contradict the defendant's testimony. Here the distance which the defendant's automobile ran after the accident, the distance the body of the deceased was hurled by the impact, and other circumstances testified to by an eye-witness tend not to support but to contradict the defendant's statements.

It is the contention of appellant that the court erred in refusing to grant defendant's motion to change the answer to the second part of the fifth question relating to the pecuniary damage sustained by the children from $2,250 to nothing. The court ordered that unless the plaintiff should remit from the $2,250, the amount fixed by the jury for pecuniary loss to the children, the sum of $750, there should be a new trial. The plaintiff elected to make the remission and judgment was entered accordingly. The plaintiff complains of this ruling and contends that it was error for the court to order a new trial unless the plaintiff should make the remission. If the plaintiff desired to raise the question of whether or not there was an abuse of the trial court's discretion in ordering a new trial under the

conditions stated it should have refused to make the remission and then have taken an appeal from the order granting a new trial. Having accepted the provisions of the order made by the trial court the plaintiff may not complain, for as to the plaintiff the damages are, in effect, agreed to, and judgment was entered by plaintiff's consent.

The defendant also contends that there was no showing that the children of the deceased suffered any pecuniary loss. The evidence showed that the deceased had no regular employment. She kept house for herself and her two daughters until the marriage of the elder daughter and then for herself and her younger daughter, Minetta. She went out occasionally to do work by the day. She had no regular fixed employment. There was no evidence showing how many days during the year she worked nor as to the rate of compensation she received when employed. It is the further contention of defendant that from a purely financial standpoint it is not shown that her earnings exceeded the cost of her maintenance and therefore she made no contribution in a financial sense to her children. The showing in this case was very meager. Minetta, the younger daughter, was at the time of her mother's death seventeen years of age. While there can be no recovery for society and companionship, there is no hard-and-fast rule by which pecuniary damages may be measured in all cases. We adopt the rule laid down by the supreme court of the United States in *Mich. Cent. R. Co. v. Vreeland,* 227 U. S. 59, 33 Sup. Ct. 192, to the effect that a minor child "sustains a loss from the death of a parent, and particularly of a mother, of a kind altogether different from that of a wife or husband from the death of the spouse. The loss of society and companionship, and of the acts of kindness which originate in the relation and are not in the nature of services, are not capable of being measured by any material standard. But the duty of the mother to minor children is that of nurture, and of intellectual, moral, and physical

training, such as when obtained from others must be for financial compensation." There was evidence here from which the jury might well have inferred that the deceased rendered valuable services to her maturing daughter, that the daughter must now be deprived of the intellectual, moral, and physical training which she would have received from her mother, unless some person provides it for her for compensation. The amount of the recovery having received the approval of the trial court, we do not feel warranted in disturbing it.

Upon the trial it was stipulated that the amount expended for hospital, doctor, and funeral expenses was $407.50. In entering judgment, interest on this amount was allowed from the date of the accident to the time of entry of judgment. Of this the defendant complains. Necessary reasonable expenditures for physician, hospital, and burial are to be taken into consideration by the jury in determining the amount of damages which the plaintiff is entitled to recover. The damages do not become liquidated and fixed until the amount thereof is determined by a verdict. The trial court was in error in allowing interest upon these items. The recovery here is not by way of implied contract to reimburse, but the expenditures are shown as an element of damage because they are due to the negligent act of the defendant for which he is liable. *Olson v. Laun,* 170 Wis. 106, 174 N. W. 473; *J. I. Case P. Works v. Niles & Scott Co.* 107 Wis. 9, 82 N. W. 568. The judgment is modified by deducting therefrom the sum of $50.94 interest.

By the Court.—The judgment of the circuit court is modified as indicated in the opinion, and as so modified is affirmed, neither party to recover costs in this court. The appellant shall pay the clerk's fees.

A motion for a rehearing was denied, with $25 costs, on March 8, 1921.

MATUSCHKA, Respondent, vs. MURPHY and another, Appellants.

December 16, 1920—March 8, 1921.

Physicians and surgeons: Lack of care and skill of dentist in treating tooth: Proximate cause: Burden of proof: Uncertainty: Special verdict: Omnibus question as to negligence: Subdivision of questions to cover litigated issues.

1. The function of a special verdict is to secure a finding on each litigated question. In negligence cases each ground of negligence constitutes a distinct question, and proper practice requires the special verdict to be so framed as to indicate in what respect the jury agree in finding negligence.
2. Although the evidence is sufficient to sustain a finding that the employee of the defendant dentist failed to exercise proper care and skill, it is *held* that the evidence—showing that plaintiff had a chronic infection of the lower jaw when he appeared for treatment, the future progress of which it was impossible to foretell, and that the subsequent spreading of the infection could have followed the treatment actually administered or might have followed treatment in accordance with exact scientific methods—is insufficient to support a finding that the lack of care and skill of the dentist was the proximate cause of plaintiff's injuries.
3. Where the proof discloses that a given result may have been caused by two or more causes, one of which was the negligence of the defendant, and a jury can only conjecture as to which is the efficient cause, the plaintiff has not met the burden of proving proximate cause.

APPEAL from a judgment of the circuit court for Milwaukee county: GUSTAVE G. GEHRZ, Circuit Judge. *Reversed.*

The defendant *W. B. Murphy* was a dentist in the practice of his profession at Milwaukee and had been such for a number of years prior to December 1, 1918. The defendant *Stromberg* had been in his employ for about a year and a half prior to that date, at which time he was in charge of his office, the defendant *Murphy* being on his vacation. On Saturday, November 30th, the plaintiff, who was then suffering with a previously developed toothache, called at the office for dental advice and services. The plaintiff

testified that there was a swelling of the gum in the region of the first molar of the left jaw. *Stromberg* extracted the tooth. Before extracting the tooth he injected a two per cent. novocain solution for the purpose of deadening the peripheral nerves. Plaintiff testified that the needle was first injected into his lip and, without resterilization, was injected into the swollen gum. *Stromberg* denied that the needle was injected into plaintiff's lip and denied that the gum was swollen. He divided the tooth and took it out in two parts. A pus sac was attached to the first root, but none to the second. He did not curette the socket, but washed it out with boric acid and swabbed it liberally with iodine.

Plaintiff returned Monday morning and there was more swelling. The infection had traveled forward. *Stromberg* washed out the socket thoroughly and painted it with iodine, gave instructions to keep it clean, and directed plaintiff to return in the afternoon. In the afternoon the same procedure was followed. Tuesday morning plaintiff again called at the office, the swelling was still present down deep, but not alarming. He again washed it out with boric acid and painted it with iodine, and did the same thing on Tuesday afternoon. Plaintiff returned Wednesday, when it looked as though the swelling would open on the face, and *Stromberg* then referred him to Dr. Wenker. Dr. Wenker discovered a serious infection, with a high temperature and pulse. He curetted the socket from which the tooth had been extracted, made liberal incisions through the cheek and gum, put in packing, and, eventually, removed seven of the lower front teeth and portions of the jaw bone.

This action was brought by the plaintiff against the defendants to recover damages, on the theory that the serious consequences resulting from the infection were due to the improper practice of the defendant *Stromberg* in the extraction of the tooth and subsequent treatment. The case was tried before a jury and the following special verdict

returned: (1) that *Dr. Stromberg* in his treatment and care of the plaintiff failed to use such reasonable care and skill as was ordinarily possessed and exercised by dentists in good standing, of the same system or school of practice, in the city of Milwaukee in November and forepart of December, 1918; (2) that such want of care and skill was the proximate cause of plaintiff's injuries; and (3) damages $10,000. Upon motion made after verdict the court gave plaintiff the option of taking judgment for $4,745 or a new trial. Plaintiff elected to take judgment for the reduced amount, and from the judgment so entered the defendants bring this appeal.

For the appellants there was a brief by *Lines, Spooner & Quarles,* and oral argument by *Leo Mann,* all of Milwaukee.

For the respondent there was a brief by *Martin J. Brennan,* attorney, and *Timlin & Dean,* of counsel, all of Milwaukee; and the cause was argued orally by *Mr. Brennan* and *Mr. William H. Timlin.*

The following opinion was filed January 11, 1921:

OWEN, J. The jury found, in response to question 1 of the special verdict, that *Dr. Stromberg,* in his treatment and care of the plaintiff, failed to use such reasonable care and skill as was ordinarily possessed and exercised by dentists in good standing, of the same system or school of practice, in the city of Milwaukee in November and forepart of December, 1918. Fault is found with this question because it did not disclose the respect in which the jury found that *Dr. Stromberg* failed in the use of reasonable care and skill. Upon the trial it was contended that he was negligent in four respects: (1) failure to resterilize the needle after injecting it into plaintiff's lip; (2) that the anæsthetic was injected into an infected area; (3) that he did not curette the tooth socket after extracting the tooth; and (4) in failing to send the plaintiff to a surgeon until the fourth day after the extraction. It is apparent that

the form of the question is such that the jury might have agreed that *Stromberg* failed to use the requisite degree of care and skill and yet they might not have agreed on the particular in which he failed. Under the circumstances proper practice required that the question be so framed as to indicate in what respect the jury agreed that there was a failure on the part of the defendant *Stromberg* to use reasonable care and skill. As the question and answer stand, it cannot be said that the jury agreed that he was negligent in any one of the four particulars urged.

It is the function of a special verdict to secure a finding by the jury on each question litigated. In negligence cases each ground of negligence constitutes a distinct litigated question, and proper practice requires that the jury be given an opportunity to find specially with reference to each particular ground of alleged negligence. This cannot be accomplished by the submission of an omnibus question in which the jury is required to find generally upon the question of negligence. Such verdicts have been sustained in cases where negative answers have been returned to the general question of negligence and the jury were instructed that if they found certain facts to exist they should answer the question in the affirmative, as in *Kadolph v. Herman,* 166 Wis. 577, 166 N. W. 433. In such cases the finding of an absence of negligence presents a different question from that resulting in case of an affirmative finding. The negative answer indicates that in the minds of the jury none of the alleged grounds of negligence was proven. In the case of an affirmative answer some of the jury might have concluded there was negligence upon one ground and some upon another, resulting in a situation where all of the jurors agreed that there was negligence but did not agree upon the grounds thereof. He who is charged with negligence in several particulars is entitled to have a finding of the jury upon the existence of every set of facts upon which negligence is predicated.

While we merely pause here to comment upon the form of this question, and to suggest that it would have been preferable practice to have subdivided the question or to have so framed it as to require the jury to indicate the particular respect in which the defendant failed to exercise proper care and skill, we find it unnecessary to determine whether the form of the question constituted reversible error, as our disposition of the case will rest upon more substantial considerations.

While there is sufficient evidence in the record to sustain a finding that the defendant *Stromberg* did fail to exercise such reasonable care and skill as was ordinarily possessed and exercised by dentists in good standing, of the same system or school of practice, at the time in question, we find a total absence of proof to support the further fact, essential to a recovery, namely, that such want of care and skill was the proximate cause of plaintiff's injuries. That plaintiff's painful experience and its lamentable results were due to an infection of the lower jaw, is conceded. The question is, What caused the infection? In order to recover against the defendants, plaintiff must produce evidence from which the jury is justified in finding that it was due to the want of care and skill of the defendant *Stromberg*. This burden is not met by showing that it might have been the result of two or more causes, one of which was plaintiff's unskilful treatment. Verdicts must rest upon greater certainty. Where the proof discloses that a given result may have occurred by reason of more than one proximate cause, and that a jury can do no more than guess or conjecture as to which was in fact the efficient cause, the submission of such a choice to the jury has been consistently condemned by this court. *Musbach v. Wis. C. Co.* 108 Wis. 57, 84 N. W. 36; *Quass v. Milwaukee G. L. Co.* 168 Wis. 575, 170 N. W. 942; *Klein v. Beeten*, 169 Wis. 385, 172 N. W. 736.

That at the time plaintiff went to the defendants for treatment of his tooth there was an infection at the root

thereof is conceded by all the experts who testified in the case. That the subsequent serious consequences to plaintiff's jaw might and probably were due to such pre-existing infection most satisfactorily appears from their evidence. A number of practicing dentists in the city of Milwaukee testified on plaintiff's behalf, but their testimony was confined to the question of whether the treatment of *Dr. Stromberg* was in accordance with approved and usual practice. They did not assume to testify upon the question of whether the serious results were due to *Stromberg's* lack of care and treatment and, indeed, they probably were not qualified to express an opinion upon that question, as the origin and progress of an infection is a bacteriological question, and they professed no special training upon that subject.

Dr. Wenker, the physician to whom plaintiff was sent by the defendant *Stromberg,* testified that the condition in which he found the patient might have been due to one of two causes: the virulency of the infection existing in the jaw or the added infection made by the injection. He further testified:

"The fact that this plaintiff felt pain on Friday, before the tooth was extracted, indicated a lighting up of this chronic infection which had been present previously. That infection might have been in his system for quite a few years, so that it was becoming acute and developed into this condition on Friday, and when the infection gets into that shape no one can tell just what form it is going to take from then on. In many cases it spreads in spite of all that is done to prevent it."

Elbert J. Weaver, a dentist specializing in pyorrhea and dental surgery, vouchsafed the opinion that the subsequent injurious results to plaintiff were due to the injection. It appears, however, that his opinion is founded upon two personal experiences, and that his knowledge upon the subject of bacteriology in general or of infections in particular is not such as to carry great convincing power. Even this

witness concedes that it is possible, but improbable, that the infection might have come from other causes and not from the injection. He also concedes that "It is accepted that there are cases where in spite of all we do, and in spite of all the precautions we have taken, infection comes; you don't know where, but it comes."

The foregoing is the extent of plaintiff's proof in support of a finding that the want of care and skill exercised by the defendant *Stromberg* was the proximate cause of plaintiff's injuries. Even though there was no further proof in the case, it is apparent that the jury could do no more than guess or conjecture as to whether plaintiff's injuries resulted from the original infection or from the defendant *Stromberg's* lack of skilful treatment. But a consideration of defendants' evidence places the matter beyond the pale of doubt.

Dr. G. V. I. Brown, an oral surgeon of the widest experience, who has taught oral surgery and kindred subjects for many years at Marquette University, at the University of Iowa, and at the Southern Dental College in Atlanta, who had charge of the section of plastic and oral surgery in the surgeon general's office during the war, who was sent by the surgeon general to Fort Oglethorpe, where he established a school and taught plastic and oral surgery to equip surgeons for the hospitals in the field, and who thereafter did all the operating and had entire charge of all the jaw cases at Cape Maine, New Jersey, where all of the head-injury cases resulting from the war were brought, and who has written text-books and is a universally recognized authority on the subject of oral surgery, testified that there could be very many causes for plaintiff's injuries; that the original infection would tend to progress in any event unless relieved; the progress of the extension would largely depend upon the condition of health of the individual, and that without a bacteriological examination it would be impossible to determine the cause of the spreading of that

infection; that if there had been no extraction of the tooth at all, the infection would have gone right on and made more trouble all the time, probably. "Keeping in mind the fact that a pus sac was found on one of the roots, that could have developed an infection and spread without any extraction of the tooth, or without any injection of anæsthetic. I have had hundreds of such cases."

Daniel Hopkinson, a physician and surgeon, holding the chair of bacteriology and pathology at Marquette University Dental Department, and who specializes in those subjects, testified minutely with reference to the origin and development of infections of various kinds. It is not important that we should refer to his more highly scientific testimony, but the following are some of his pertinent statements with reference to the case in hand. Among other things he said:

"In any given case where there is a mixed infection, I cannot tell whether it will progress or remain dormant, or anything of that kind, because there are two factors that enter into the progress or modification of the progress of any infection. The first factor is the disease-producing power of the germ, and the second is the resistance of the individual. . . . The fact that there existed at the time of the removal of the tooth an acute lighting up of an old infection; further, the removal of the tooth in and of itself mechanically may have still further lighted up the infection and caused it to spread. The lighting up of the infection may have in and of itself continued to spread. There undoubtedly was a lighting up of the infection here, without question, for the reason that there was a pus sac, indicating that there had been a dormant infection at some time and that there progressively ensued an involvement of further tissue indicating an acute type of infection that then existed. The fact that there was pain on Friday established the fact that there was a lighting up. The infection which was lighted up before the removal of the tooth, as evidenced by the pain, in and of itself could have progressed with the result which has been stated, without any manipulation, without the extraction of the tooth, and without there having been any injection into the gums. That result could have followed had the tooth been removed under a general

or gas anæsthetic, and also if the tooth had not been removed at all. At any time the lighting up of a dormant infection, and particularly a typical abscess, may result in a lighting up which progresses to the extent of destruction that here presented itself, without any manipulation whatever. It is a fact that with an infectious process it is absolutely impossible for a surgeon or any one to foretell exactly how the infection will progress. The influence of the injection into the gums, as outlined, for the purpose of producing anæsthesia, in my opinion did not have any influence upon the progress of the disease. . . . The number of bacteria that might be introduced by such a method of procedure as you have outlined, that is, the penetrating of the lip with the needle, compared with those that were already present, is so small that it would be purely speculative to say that they had any influence whatever in the progress."

It is unnecessary to detail further the scientific and expert evidence appearing in the record. It discloses this situation: Plaintiff had a chronic infection of the lower jaw, of long standing, when he went to the defendants' office for treatment. It was impossible to foretell the future progress of that infection. The subsequent results could have followed from it without the pulling of the tooth at all or by the pulling of the tooth and the subsequent treatment of the jaw according to the most exact scientific methods. They might also have followed from defendant *Stromberg's* negligent and improper practice and treatment. Which was the cause of the ultimate results cannot be told with any degree of certainty. While the experts differed as to the probability of the efficient cause, they conceded the possibility of any one of several causes. Where we have a result which may be attributable to one of two causes, it is not surprising that experts will differ as to the real cause. It emphasizes the fact, however, that any conclusion with reference thereto is mere conjecture and falls far short of that certainty which the law requires for the support of verdicts. Our conclusion is that the verdict of the jury, in so far as it finds that the want of care and skill on the part

of *Stromberg* was the proximate cause of plaintiff's injuries, is unsupported by the evidence and cannot be sustained.

By the Court.—Judgment reversed, and cause remanded with instructions to enter judgment dismissing plaintiff's complaint.

A motion for a rehearing was denied, with $25 costs, on March 8, 1921.

REITER, Appellant, vs. GROBER and another, Respondents.

January 12—March 8, 1921.

Automobiles: Negligence of driver as imputed to occupants: Liability for negligence of driver.

1. Where the evidence in an action for injuries sustained by the plaintiff by being run over by an automobile showed that the automobile journey during which the accident occurred was to make a social visit for which one of the defendants, who was driving the car, alone had received an invitation, and that he had invited his father and brother, who were the other defendants, to ride with him, it is *held* that the father and brother were guests in the automobile, even though it was owned by the father, and that the driver alone is liable for injuries to third persons caused by his negligence.
2. The negligence of the driver of a private vehicle is not imputed to an occupant who has no control over the driver, is not engaged in a joint undertaking with him, is guilty of no negligence himself, and stands in no other relation to the driver requiring the negligence of the latter to be imputed to the occupant.
3. The doctrine of *Prideaux v. Mineral Point,* 43 Wis. 513, in so far as it imputes the negligence of the driver of a private vehicle to an occupant therein, although steadily adhered to since its announcement, is not a rule of property so as to make applicable the rule of *stare decisis;* and in the interests of justice and to conform to the overwhelming weight of authority it is expressly overruled.

APPEAL from a judgment of the circuit court for Milwaukee county: JOHN J. GREGORY, Circuit Judge. *Affirmed.*

Action to recover damages for injuries sustained by plaintiff in being run over by an automobile driven by Harvey Grober. *William Grober,* his brother, and *Gust Grober,* his father, the respondents, were also occupants of the automobile. It appears that *Gust Grober* and *William* were guests in the automobile, having been invited by Harvey to accompany him on the trip. Much evidence was taken as to who owned the automobile, the sons Harvey and Edwin or the father. The trial court found that the sons named owned the machine and entered judgment dismissing the complaint upon the merits as to *William Grober* and *Gust Grober,* whereupon plaintiff voluntarily entered a nonsuit against the defendant Harvey Grober, and appealed from the judgment dismissing the case as to *Gust* and *William Grober.*

William A. Schroeder and *Horace B. Walmsley,* both of Milwaukee, for the appellant.

For the respondents there was a brief by *Bloodgood, Kemper & Bloodgood,* attorneys, and *Emmet Horan, Jr.,* of counsel, all of Milwaukee; and the cause was argued orally by *Mr. Horan.*

VINJE, J. We have carefully examined the evidence with reference to the ownership of the automobile with the result that we think the trial court correctly decided that issue. But if it did not the legal questions presented would be the same, for the evidence is undisputed that Harvey Grober was the one primarily interested in making the social visit that was made. He alone received the invitation and he in turn invited his father and brother to accompany him. This they did as his guests. He drove the machine, and there is no evidence that either the father or the brother interfered in the least with his management of it or were called upon to do so. A man may be a guest in his own automobile. So even if the father owned the machine, under the evidence he would have to be classed as a guest therein so far as this trip

is concerned. The same is true of the brother, *William*. As guests are they liable to plaintiff for the negligence of Harvey, the driver? It is claimed that they are, under the doctrine of *Prideaux v. Mineral Point,* 43 Wis. 513. That case held that the driver of a private conveyance is the agent of a person therein to the extent that if his negligence contributes jointly with that of a third person to an injury received by the occupant there can be no recovery against the third person because the negligence of the driver is imputed to the occupant, thus creating contributory negligence barring recovery. It is now sought to extend this doctrine so as to make the occupant liable to third persons for the negligence of the driver. That there is a substantial difference between the rule as announced in the *Prideaux Case* and the claim made by plaintiff is obvious. A person may well be content to trust his own safety to a driver, and yet not be willing to indemnify third persons who may suffer through his negligence. He may say, so far as I am concerned his negligence is my negligence, but I do not agree to become responsible to others for his negligence. To extend the doctrine to that degree would make a guest in a private conveyance an insurer of third persons against the negligence of the driver. Instead of being invested with the liabilities of a guest he would shoulder those of a master. We not only decline to so extend the rule of *Prideaux v. Mineral Point,* 43 Wis. 513, in so far as it imputes the negligence of the driver of a private vehicle to an occupant therein, but we take this occasion to expressly overrule it. We do so now the more readily because no litigant before the court suffers by reason of the repudiation of the doctrine. It had its inception in this state in *Houfe v. Fulton,* 29 Wis. 296, decided in 1871, where Mr. Chief Justice DIXON says:

"The only questions here are whether there was any want of ordinary care on the part of the plaintiff or on the part of the person with whom he was riding and who was driving the horse at the time of the injury, which also contributes

to the injury, . . . and whether the defect in the bridge was the sole cause of the injury." Page 299.

The court held that since the evidence did not conclusively show such negligence on the part of the driver a nonsuit was improperly granted. This implied that negligence of the driver would bar recovery as stated in *Prideaux v. Mineral Point,* 43 Wis. 513, 526. But it was not until the decision in the latter case that this state became explicitly sponsor for the doctrine that an occupant in a private conveyance who has no control over the driver; who is not engaged with him in a joint undertaking other than traveling with him, and who stands in no blood, marriage, or other relation to him, has the negligence of the driver imputed to him so as to bar a recovery against a third person whose negligence contributed to the injury. The principle there announced has been steadily followed since, either by a re-affirmance thereof or under the rule of *stare decisis.* See *Otis v. Janesville,* 47 Wis. 422, 2 N. W. 783; *Johnson v. Superior R. T. R. Co.* 91 Wis. 233, 64 N. W. 753; *Lockwood v. Belle City St. R. Co.* 92 Wis. 97, 65 N. W. 866; *Ritger v. Milwaukee,* 99 Wis. 190, 74 N. W. 815; *Olson v. Luck,* 103 Wis. 33, 79 N. W. 29; *Lightfoot v. Winnebago T. Co.* 123 Wis. 479, 102 N. W. 30; *Lauson v. Fond du Lac,* 141 Wis. 57, 123 N. W. 629; *Landry v. Great Northern R. Co.* 152 Wis. 379, 140 N. W. 75; *Hains v. Johnson,* 154 Wis. 648, 143 N. W. 653; *Sommerfeld v. C., M. & St. P. R. Co.* 155 Wis. 102, 143 N. W. 1032; *Kuchler v. Milwaukee E. R. & L. Co.* 157 Wis. 107, 146 N. W. 1133; *Puhr v. C. & N. W. R. Co.* 171 Wis. 154, 176 N. W. 767. In the *Kuchler Case* it was applied in all its rigor to a boy ten years old riding with his grandfather. So it must be admitted that there has been no substantial wavering on the question. In *Lightfoot v. Winnebago T. Co.* 123 Wis. 479, 102 N. W. 30, Mr. Chief Justice CASSODAY said that the rule had been steadily adhered to and that if a contrary rule was to prevail it was for the legislature to say so. Were it a rule of property we should

certainly apply to it the rule of *stare decisis*. But it is not a rule of property. It is a pure judicial decree relating to liability for negligence, and the court would not for a moment give countenance to an argument that a wrongdoer relied upon it. We are therefore at liberty to change the rule in the interests of justice and to conform to the overwhelming majority rule. See cases cited in note to 8 L. R. A. N. S. 597 *et seq.* and in L. R. A. 1915A, 763, supplementing it, and also 20 Ruling Case Law, 158 *et seq.* and cases cited in note 13; *Id.* 163; Whittaker's Smith on Negligence (2d Am. ed. 1896, p. 508); 1 Shearman & Redf. Negligence (6th ed.) § 65*a et seq.;* 1 Thompson, Comm. on Negligence (2d ed.) § 499 *et seq.;* Buswell, Personal Injuries (2d ed.) § 105; Beach, Contributory Negligence (2d ed.) § 110; 1 Beven, Negligence (2d ed.) p. 203 *et seq.;* 29 Cyc. 548; dissenting opinion in *Mullen v. Owosso,* 100 Mich. 103, 58 N. W. 663, 23 L. R. A. 693. The above authorities show that only a few states adhere to the imputed negligence rule and some of them by a divided court.

The doctrine was founded upon the idea that the occupant voluntarily made the driver his agent for the trip by accepting a ride with him;—that he trusted his safety to him and thereby became so identified with him that the driver's negligence became his own. While there is some ethical ground for this idea it has never received extended judicial approval, and it has been pointed out that it rests upon no sound legal basis either as to agency or identity; that the driver as well as the third party become tortfeasors toward the occupant when he is injured by their joint negligence, and that he can pursue either or both.

The rule has received severe criticism by many textwriters. See 1 Shearman & Redf. Negligence (6th ed.) p. 166 *et seq.;* 1 Thompson, Comm. on Negligence (2d ed.) § 499. Strange to say, in spite of the fact that Mr. Chief Justice RYAN pointed out in the *Prideaux Case* that it might not be applicable to public conveyances, the Wisconsin rule

has often been discussed as though it applied to them. The case of *Thorogood v. Bryan,* 8 C. B. 115, applied to public conveyances—omnibuses,—and it has been generally conceived that, since that case has been discredited by English and American courts (see text-writers cited above), the same discredit has attached to the rule of imputed negligence declared in the *Prideaux Case.* Our court has never applied the rule to public conveyances and has negatived such application. *Landry v. Great Northern R. Co.* 152 Wis. 379, 140 N. W. 75; *Ellis v. C. & N. W. R. Co.* 167 Wis. 392, 167 N. W. 1048; *Bakula v. Schwab,* 167 Wis. 546, 168 N. W. 378. This much charity requires to be said in behalf of the doctrine now to be laid at rest after a vigorous life of fifty years.

When and under what circumstances the occupant may be guilty of contributory negligence or engaged in a joint undertaking with the driver or stand in such relation to him that the negligence of the driver may be imputed to him it is not now necessary to discuss.

Only so much of the *Prideaux Case* is overruled as imputes the negligence of the driver to an occupant in a private conveyance who has no control over the driver; is not engaged in a joint undertaking with him; is guilty of no negligence himself; and stands in no other relation to him requiring his negligence to be imputed to the occupant.

By the Court.—Judgment affirmed.

FIRST NATIONAL BANK OF TOWNER, NORTH DAKOTA, Appellant, vs. REED, Respondent.

February 8—March 8, 1921.

Bills and notes: Holder in due course: Pledge: Note redeposited after maturity.

A note of $800, given as the initial payment on a land contract, was deposited with the plaintiff to secure a $2,000 note of the vendor, and after the $800 note became due a new note of $2,500 executed by a third person was given to the plaintiff and the $800 note redeposited. *Held,* that the finding of the court that the $2,000 note was paid by the $2,500 note and that the title to the $800 note was acquired by its redeposit after it was due, is sustained by the evidence.

APPEAL from a judgment of the circuit court for Waupaca county: BYRON B. PARK, Circuit Judge. *Affirmed.*

Action to recover on a promissory note. On the 31st day of August, 1916, the defendant entered into a contract with the Alfalfa Valley Land Company of North Dakota to purchase certain lands in that state. The contract provided for a cash payment of $800, which defendant paid by executing his note for that amount due in thirty days. It was agreed that the note should not be negotiated. He was to pay $35 per acre for the land, which was incumbered to the extent of $25 per acre. It was provided that if the title was not made merchantable by the vendor the agreement should be void and all payments made pursuant to the contract should be returned to the defendant. On the 2d day of September, 1916, the Land Company deposited said $800 note with the plaintiff as collateral security for its note for $2,000 then held by plaintiff. The $800 note became due October 1, 1916. The note of the Land Company, to secure which the $800 note was deposited as collateral, became due November 5, 1916.

The R. C. Kittel & Company was a corporation organized under the laws of the state of North Dakota, composed of

the same stockholders as the Alfalfa Valley Land Company. The R. C. Kittel & Company held a mortgage on all the lands of the Land Company and was to receive a profit from the sale of its lands. One R. C. Kittel was president of both companies.

On the 20th day of November, 1916, the cashier of the plaintiff bank called on the said R. C. Kittel with a view of securing payment or further security of the said $2,000 note of the Land Company. The following transaction was the result of the interview: A new note of the Alfalfa Valley Land Company was executed to the bank in the sum of $2,500 to cover the $2,000 note and its overdraft of $500. The R. C. Kittel & Company also executed its note to the bank for the sum of $2,500, and all of the collateral security then held by the bank to secure the $2,000 note was retained by the bank. A written pledge of security was also executed by the R. C. Kittel & Company, reciting:

"Whereas, the undersigned, R. C. Kittel & Company, a corporation, is indebted to the *First National Bank of Towner, North Dakota,* in the sum of $2,500, due October 1, 1917:

"This is to certify that the said R. C. Kittel & Company, a corporation, has deposited with the obligations evidencing such indebtedness to the *First National Bank of Towner,* as collateral security, the following described notes and bonds, to wit:" [here follows a description of the collateral security, which describes, among others, "note of *Joseph Reed* for $800; note of Alfalfa Valley Land Company for $2,500, together with all mortgages securing said notes," etc.]

The trial court held that at the time plaintiff first took defendant's $800 note, to wit, the 2d day of September, 1916, it knew that it was an earnest-money note and subject to the clause in defendant's land contract to be refunded in case of the inability of the Land Company to give a good title to the land; that the Land Company was unable to give a good merchantable title to the land covered by said contract, and that the said lands were not conveyed to the defendant,

Joseph Reed; that said contract had been canceled before the commencement of this action, and that there was no other consideration for the giving of said note; that the $2,000 note of the Land Company, for which the note of the defendant, *Joseph Reed,* was deposited as collateral security, was paid by the note of the R. C. Kittel & Company executed to the bank on or about the 20th day of November, 1916; that to secure the $2,500 note of the R. C. Kittel & Company a new note of the Alfalfa Valley Land Company for $2,500, and other collateral security, including the note of the defendant herein sued upon, was redeposited with the bank as collateral to said $2,500 note of the R. C. Kittel & Company; and as conclusions of law the court found that the plaintiff bank is not a holder in due course of the note which is the subject of this suit and is not entitled to recover thereon. From a judgment in favor of the defendant entered on these findings plaintiff brings this appeal.

For the appellant there was a brief by *Irving P. Lord,* attorney, and *Browne, Browne & Smith,* of counsel, all of Waupaca; and the cause was argued orally by *L. D. Smith.*

For the respondent there was a brief by *Morgan & Benton,* attorneys, and *Morgan & Johns,* of counsel, all of Appleton; and the cause was argued orally by *John Morgan.*

OWEN, J. The only question in this case is whether the plaintiff bank owns the note in suit as a holder in due course. Whether it took the note as a holder in due course on September 2d is not material, as its present title is not referable to that transaction.

The trial court held that on the 20th day of November, 1916, the original $2,000 note of the Alfalfa Valley Land Company was paid by virtue of the transactions occurring on that day set forth in the statement of facts. This finding is assailed by appellant on the ground that it is not supported by the evidence. The appellant contends that the transactions occurring between the cashier of the bank and the

R. C. Kittel & Company on that day amounted to a renewal of the $2,000 note of the Alfalfa Valley Land Company and that the R. C. Kittel & Company note for $2,500 was collateral to the Land Company note,—the note here in suit remaining with the bank as continuing collateral to the indebtedness of the Land Company. Viewing the transaction in the light of ordinary business experience, we think it a natural inference that the purpose of the cashier was to secure either payment of the Land Company indebtedness or further collateral security therefor, and that under ordinary circumstances the Land Company note for $2,500 was merely a renewal of its $2,000 note, enlarged to cover the overdraft, and that the R. C. Kittel & Company note was executed as collateral to the note of the Alfalfa Valley Land Company.

However, R. C. Kittel testified that the note of the R. C. Kittel & Company was given in payment of the Land Company's indebtedness to the bank, including its $2,000 note and $500 overdraft, and that the Land Company note of $2,500, executed on the 20th day of November, was collateral to the said Kittel note. Furthermore, the written pledge of the collateral executed at the time (including the note in suit) is that of the Kittel & Company. The cashier himself testified that "R. C. Kittel & Company's note was given in payment of this $2,000 Alfalfa Valley Land Company note with the overdraft and interest accruing;" although, as the trial judge suggests in his opinion, he, "after manifold urging by attorneys for both plaintiff and defendant—and the court too, for that matter,—did finally say that the $2,500 Alfalfa Valley Land Company note mentioned in the collateral agreement (which note he could not remember on direct examination) was given as renewal of the $2,000 note and the overdraft." After a very careful consideration of the testimony the trial judge concluded that the result of the transaction on November 20th amounted to a payment of the $2,000 Land Company note, and so held. In so holding it would appear that the trial judge accepted

the evidence at its face value, and we cannot say that he was not warranted in so doing. The finding, therefore, must stand. The result is this: The payment of the Alfalfa Valley Land Company note in the manner aforesaid extinguished the title which the bank secured to the note here in suit under the deposit of September 2d. The title which it now has to the note was acquired by virtue of the redeposit thereof made by Kittel & Company after the same became due and is subject to the defense herein interposed. It being conceded that the defense was fully established, if available against the plaintiff, it follows that the judgment dismissing the complaint was proper.

By the Court.—Judgment affirmed.

GROSSBIER, Respondent, vs. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, Appellant. [Two cases.]

February 8—March 8, 1921.

Postoffice: Transportation of mail to and from trains: Duty of railroad company to deliver mail in accessible place: Quasi-contract: Requiring extra labor of mail contractor: Compensation.

1. A railroad company did not comply with postal regulations requiring it to place mail cars at points accessible to messengers or contractors for wagon service if the mail car was so situated that the use of a truck was necessary to transport the mail from the train to the postal wagons, a railroad platform making it impossible for wagons to back to the train.
2. A letter from the second assistant postmaster general to the railroad company as to delivery of mail from mail cars to wagons is *held* not to supersede postal regulations.
3. Where a mail contractor transporting mail between the postoffice and trains carried the mail from the train to his wagons by truck under protest that such service should be performed by the railroad, but did not claim compensation for nearly a year and until he was told by an employee of the postoffice department that such service should be performed by the

railroad company, he was entitled to recover from the railroad company, such services not having been performed without expectation of pay on his part.

4. A *quasi* or constructive contract rests upon the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another, and is not in fact a contract, but an obligation which the law creates in the absence of any agreement, when and because the acts of the parties or others have placed in the possession of one person money, or its equivalent, under such circumstances that in equity and good conscience he ought not to retain it.

5. Where the contractor transported the mail by truck from train to wagon on the refusal of the railroad company so to do, though the railroad company was obligated by postal regulations to perform such service, the contractor may recover from the railroad company on the theory that the latter was liable therefor under a *quasi*-contract.

APPEAL from a judgment of the circuit court for Wood county: BYRON B. PARK, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *Richard L. Kennedy, Donald Evans,* and *G. F. Dames,* all of St. Paul, Minnesota, and *Bundy & Wilcox* of Eau Claire, and oral argument by *Mr. Kennedy.*

For the respondent the cause was submitted on the brief of *P. A. & R. R. Williams* of Marshfield.

JONES, J. In this case there are two causes of action to recover for work and labor and the use of a truck, performed and furnished, respectively, by plaintiff for the benefit of the defendant railway company. The two causes of action are alike except that they cover different periods. From a judgment for plaintiff the defendant appeals.

The plaintiff was awarded a contract by the postal authorities for the transportation of the mails between the Marshfield postoffice and defendant company's trains in the city of Marshfield. The relations of plaintiff with defendant were controlled by the postal regulations.

Defendant placed its mail cars at such a point that it was necessary for the mails to be carried on a truck across a

platform which separated plaintiff's wagon from direct access to the mail cars. Plaintiff did not think it was his duty to do this work. From the start he protested vigorously and had many discussions with the defendant's local agent, but the agent refused to provide the labor to do the work. He notified the defendant company of the situation, and the company replied that plaintiff must furnish his own truck. As a result plaintiff continued to do the work and bought a truck. The plaintiff continued to protest that it was not his duty, and finally became convinced that he was right, by the statement of some federal postoffice employee, some time in February, 1918, and then demanded pay of defendant. Plaintiff also performed services in transferring mails from car to car at defendant's station.

The postoffice regulations, introduced in evidence, so far as they concern this question are:

Sec. 1353. "Railroad companies will be expected to place their mail cars at points accessible to mail messengers or contractors for wagon service. If cars are not so placed the companies will be required to receive the mails from and deliver them to the messengers or contractors at points accessible to the wagon of the messenger or contractor."

Sec. 1384, on page 634. "Mail messengers shall receive the mail from and deliver it into the postoffice, mail cars, and on board steamboats when such cars or boats are accessible. When cars or boats are not accessible, mail shall be delivered to the railroad or steamboat employees at nearest accessible point. Service shall be performed in accordance with the schedules of arrivals and departures prescribed by the postmaster."

In a trial before a court and jury the jury found the damages upon a special verdict, the judge reserving to himself to decide upon the undisputed evidence the question of liability. Upon the evidence the trial court concluded that plaintiff was entitled to recover for the transporting of the mails between the cars and wagon but not for transferring the mails from car to car, there being no proof that the latter was part of defendant's duties. The trial court there-

fore apportioned the damages in accordance with the undisputed evidence and gave judgment in plaintiff's favor.

It is the first contention of the appellant that the service was not rendered for the benefit of the company and that it was the duty of the plaintiff to deliver the mail bags on the cars and that the cars were accessible within the meaning of the postal regulations. It is also claimed that the plaintiff might have used trucks in carrying the mail between the postoffice and the trains. The fallacy of this argument seems to us apparent, because the express language of the regulations is that the mail cars are to be placed at points accessible for "wagon service," and that if they are not so placed the company is required to receive the mails from and deliver them to the messengers at "points accessible to the wagon."

Appellant also relied somewhat on a letter from the second assistant postmaster general notifying the company that mail-messenger service had been authorized between the postoffice at Marshfield and the trains of the company. It is hardly claimed that this letter superseded the postal regulations. There is no evidence that this officer had authority to change the regulations of the department or to interpret them in a manner contrary to their plain meaning. We construe this letter merely as a notice announcing a change which had been made in the service.

The main argument of the appellant is based on three propositions, namely: "(1st) that plaintiff, when performing the work, did not expect compensation from the defendant: (2d) that the defendant did not expect to pay the plaintiff: and (3d) that neither party assumed the services were being rendered for the benefit of the defendant." The assumption that plaintiff did not expect pay for his services is hardly justified by the facts. It is true he did not make claim for compensation for nearly a year, but he rendered his services under protest from the first, claiming that they should be performed by defendant. He was uncertain as to his legal

rights, but it seems clear that he never waived them, and there is nothing in the proof to show that he did not expect compensation if it should be found that he was entitled to it. When he was advised by an employee of the postoffice department that the service should be performed by the defendant he promptly made his claim.

Nor is the claim that neither party assumed the services were being rendered for the benefit of the defendant justified by the proof. As already stated, the plaintiff steadily maintained that he was doing work which it was defendant's duty to perform. The defendant was soon informed of the situation and must be presumed to have known the regulations under which it was carrying the mails. It seems to us too clear for argument that both parties knew that the defendant was benefited by the services.

The claim that defendant did not expect to pay plaintiff for his work in its behalf may be well founded and it is the real basis of the argument of appellant's counsel that there was no contract, express or implied. Manifestly there was no express contract. For the contention that there was no implied contract appellant's counsel greatly rely on an Ohio case, *Columbus, H. V. & T. R. Co. v. Gaffney*, 65 Ohio St. 104, 61 N. E. 152. The suit was brought on express contract for service for six years and more. In some respects this case is very similar to the present one. But there are essential differences. In the Ohio case the court found that during the entire period the plaintiff supposed it was his duty under his contract to carry the mails in the manner claimed by the defendant and that there was no request by the company that plaintiff should perform the work in question; while in the instant case the agent of the company insisted that plaintiff was bound so to do. The case was decided on the ground that there was no meeting of the minds of the parties and hence no contract. One other case in which the facts are somewhat similar is cited by respondent's counsel, namely, *Blowers v. Southern Ry.* 74 S. C. 221, 54 S. E. 368. In this

case the plaintiff rendered the services supposing it was his duty to do so; the railroad company, knowing his mistake, received the benefit of the service and was held liable.

Under the old system of pleading, when a wide gulf existed between actions in contract and those in tort and when the pleader was bound at his peril to choose his form of action, there was much confusion in dealing with implied contracts. Situations frequently arose when there was no remedy in tort, when no express contract could be proved, and yet when justice required that there should be a remedy. Necessaries might be furnished to a wife by a third person under such circumstances that in justice the husband should pay for them. Necessaries might be furnished an insane person for which in justice he ought to pay. In these and other cases which might be mentioned actions could be brought in assumpsit without any regard to the consent of the defendant or the meeting of the minds of the parties. By a fiction it was held that the pleader might allege a promise to pay and under proper proof recover upon what was called a contract implied in law. Other terms, as constructive contracts and *quasi*-contracts, are now often used to designate the relation out of which an obligation may arise. As was said by Mr. Justice COLLIN in *Miller v. Schloss,* 218 N. Y. 400, 113 N. E. 337:

"A *quasi* or constructive contract rests upon the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another. In truth it is not a contract or promise at all. It is an obligation which the law creates, in the absence of any agreement, when and because the acts of the parties or others have placed in the possession of one person money, or its equivalent, under such circumstances that in equity and good conscience he ought not to retain it, and which *ex æquo et bono* belongs to another. Duty, and not a promise or agreement or intention of the person sought to be charged, defines it. It is fictitiously deemed contractual, in order to fit the cause of action to the contractual remedy."

The principle that an obligation may thus be imposed by law for the purpose of bringing about justice and without

any actual agreement of the parties is recognized by abundant authority. 13 Corp. Jur. 244; 3 Page, Contracts, §§ 1493 *et seq.;* 6 Ruling Case Law, 588; 1 Williston, Contracts, § 3; 9 Cyc. 243; *Wojahn v. Nat. Union Bank,* 144 Wis. 646, 666, 129 N. W. 1068.

In the instant case the plaintiff has rendered service which it was not his duty to perform but which should have been performed by defendant's employees. To the extent of the value of the work defendant has been benefited thereby. Defendant not only had knowledge of the service but its agent insisted that it be continued. In doing this work plaintiff was not a volunteer, nor was he acting officiously. So far as his relations with the railroad company were concerned he would have performed his full duty by leaving the mail bags on the station platform. But he was performing duties in which the public were interested, and under the circumstances he very properly continued to do more than his contract required. We consider that justice requires that the plaintiff receive compensation for his work, and that the expectation of defendant that it would not be required to pay therefor is not a defense.

By the Court.—Judgment affirmed.

POLEBITZKE and another, Appellants, vs. JOHN WEEK LUMBER COMPANY, Respondent.

February 8—March 8, 1921.

Trespass: Logs carried by flood: Deposit on lands of another: Recovery: Entry: Damages: Evidence: Prior settlements: Nominal damages.

1. In an action of trespass involving the carrying of defendant's logs on plaintiffs' land by flood and their subsequent removal by defendant, though the incidents out of which plaintiffs claimed their cause of action arose had occurred long before the time of trial, it is *held* that under the circumstances the question of whether or not the jury should view the premises was a matter resting in the sound discretion of the trial court.

2. Evidence tending to prove that defendant paid the damages suffered by plaintiffs during the year 1905 on account of logs floating upon their land was properly excluded, payment of damages for such year not being evidence that plaintiffs had sustained damages in the following years.
3. Where the property of one person has been carried on the land of another by flood he has the right to recover its possession and for that purpose to go on the land where it lies and remove it, and is not liable for damages.
4. Nominal damages are awarded where a person has sustained an invasion of his rights; but where the defendant had a right to remove its property lodged on plaintiffs' lands, they are not entitled to other than actual damages.

APPEAL from a judgment of the circuit court for Portage county: EDGAR V. WERNER, Judge. *Affirmed.*

Trespass. This case has been before this court on two former appeals and is reported in 157 Wis. 377, 147 N. W. 703, and 163 Wis. 322, 158 N. W. 62. Reference is had to the report of the case on former appeals as to the nature of the plaintiffs' title and the boundaries of the property conveyed to the defendant and for a full statement of the facts in relation thereto. Upon the *remittitur* being filed in the circuit court there was a third trial at the May, 1917, term, upon which trial the jury disagreed. At the May, 1919, term there was a fourth trial, which resulted in a judgment in favor of the defendant, from which the plaintiffs appeal.

A. L. Smongeski of Stevens Point, for the appellants.

For the respondent there was a brief by *Fisher & Cashin* of Stevens Point, and oral argument by *W. E. Fisher.*

ROSENBERRY, J. The issues litigated upon the last trial were, first, Were any of the defendant's logs carried by the water beyond the lands owned by the boom company in lots 1 and 2 and upon the plaintiffs' lands and were any of defendant's logs lodged upon the plaintiffs' land in lot 3 above high-water mark? and second, If so, did such lodging and their subsequent removal by defendant do any damage to plaintiffs' land?

It is undisputed that the defendant had permission from the boom company to use its lands at all the times referred to in this action. The case was submitted to the jury upon a special verdict.

The trial court divided the lots into six tracts, and the jury found that in the years 1906, 1907, 1908, 1909, and 1910 the defendant's logs drifted and lodged upon tracts 1, 2, 4, and 5; that no logs lodged upon tracts 3 and 6 in said years. They also found that as to the tracts upon which logs drifted and lodged in said years there was no actual money loss sustained by the plaintiffs by reason of the logs drifting and lodging on the plaintiffs' lands or resulting from the removal of the logs therefrom. Upon the special verdict judgment was entered dismissing plaintiffs' complaint with costs.

Upon the motion of the defendant the court permitted the jury to view the premises against the objection of the plaintiffs. This is the first error assigned. The contention is that, because the incidents out of which the plaintiffs claimed their cause of action arose had occurred many years prior to the time of the trial, the conditions were greatly changed, due to the growth of weeds and brush, and that the situation at the time of trial was not substantially the same as the situation at the time the plaintiffs claim their cause of action arose, and for that reason it was error for the court to permit the jury to view the premises. The main questions involved related to the boundary of the lands which the defendant had a right to use and to the general situation of the plaintiffs' premises. Under the circumstances, the question of whether or not the jury should view the premises was a matter which rested in the sound discretion of the trial court, and we find nothing in the record which indicates that there was an abuse of the trial court's discretion.

Plaintiffs' next assignment of error is that the court erred in excluding evidence tending to prove that the defendant paid damages suffered by the plaintiffs during the year 1905 on account of defendant's logs floating upon their lands.

The evidence was correctly excluded. The payment of damages for the year 1905 was no evidence that the plaintiffs sustained damages in the years 1906, 1907, 1908, 1909, and 1910.

Plaintiffs' third contention is that the court erred in granting judgment for the defendant upon the verdict, for the reason that, the jury having found that the defendant's logs did lodge upon the plaintiffs' lands, the plaintiffs were entitled to nominal damages as a matter of law. There is ample evidence to sustain the finding of the jury to the effect that the plaintiffs suffered no actual damages by reason of the defendant going upon their premises to remove the logs which had been carried thereon by high water. While there is a conflict of authority, we think it is the better rule that where the property of a person has been carried upon the land of another by flood he has a right to recover its possession and for that purpose to go upon the land where it lies and remove it, and under such circumstances is not liable for nominal damages. *Proctor v. Adams,* 113 Mass. 376; *Forster v. Juniata B. Co.* 16 Pa. St. 393; *Sheldon v. Sherman,* 42 N. Y. 484; sec. 30.07, Stats. Nominal damages are awarded because a party has sustained an invasion of his rights. Here the plaintiffs' rights were not invaded. The defendant had the right to remove its property. There being no invasion of the plaintiffs' rights, they are not entitled to nominal damages or to other than actual damages. The jury found upon ample evidence that the plaintiffs sustained no actual damage. The judgment of the trial court, therefore, is right.

By the Court.—Judgment affirmed.

SCHMUDLACH, Respondent, vs. DANNER, Appellant.

February 8—March 8, 1921.

Animals: Trespass by cattle: Failure to maintain lawful fence: Wilful trespass.

1. Under sec. 1391, Stats., barring landowners who do not maintain partition fences from recovering for trespasses by animals of adjoining landowners, the obligation rested on the plaintiff landowner, if he desired to recover damages for the straying of defendant's cattle from the latter's adjoining farm upon plaintiff's farm, to see to it that a proper partition fence was built; and it was therefore immaterial whether the proceedings of fence viewers to establish a partition fence were taken according to the statute or whether the blame for failure to have the fence completed should be placed upon plaintiff or defendant or both.
2. The common-law absolute liability of the owner of domestic cattle for damage done by his default in failing to so care for them that they do not stray from his lands to those of another is still the law of this state except as modified by statute.
3. The provisions of sec. 1391 apply only to such trespasses as are occasioned by the natural propensity of the animals themselves, and not to a positive intentional act of the owner or keeper of such animals whereby the trespass is occasioned; and as to such wilful trespasses the absolute common-law liability of owners for trespasses by their cattle is still in force.
4. To constitute wilful trespass as distinguished from the trespass contemplated by sec. 1391, Stats., there must be more than a mere turning of cattle loose from the owner's barnyard onto his own fields, even if he has reason to believe that if left to themselves they will probably wander into the unfenced field of his neighbor; and in an action for such a trespass on a clover field, where there was a gap in the partition fence, an instruction that there would be a wilful trespass if defendant "knew that his cattle had discovered the clover field and were certain to return if they were given the chance, to turn them out of his barnyard towards the gap and knowingly allow them to walk direct to the clover field," was too broad.

APPEAL from a judgment of the circuit court for Waushara county: BYRON B. PARK, Circuit Judge. *Reversed.*

The plaintiff and defendant own adjoining farms divided

by a town line. They discussed the further maintaining of a partition fence. The defendant then built a portion of the fence from the center to the south except a part cut off by a highway crossing near the corner. The plaintiff not completing the other portion, the defendant called for fence viewers under the statute. They met and decided that the plaintiff should build the north forty rods and the defendant the south forty rods. The plaintiff, being dissatisfied with the determination of the fence viewers, left a gap of about twenty-four feet between the center of the line and the south end of his fence. Just opposite this gap was plaintiff's clover field, the second crop on which, during a summer following the building of the fence, was destroyed by cattle.

The plaintiff commenced this action in trespass for such damages. The defendant asserted as a defense that the plaintiff had failed to comply with the orders of the fence viewers and had failed to erect and maintain the proper fence between the two farms, and that he was precluded by statute from recovering damages for any such trespass.

At the trial the plaintiff amended his complaint by alleging that the trespass was a wilful one. He offered the evidence of witnesses which he claimed tended to show that the defendant intentionally drove his cattle through the gap and onto the clover field.

By special verdict the jury found that the defendant did wilfully trespass upon the plaintiff's clover field and did damage to the extent of $30. They also found that the fence built by the plaintiff and maintained by him up to the time of the alleged trespass was not a legal fence.

The following is the substance of the testimony of the witnesses relied upon by plaintiff as showing a wilful trespass:

Fred Buschke testified that he saw defendant drive his cattle to the clover field. Saw him drive them through the gap twice; they were going towards the gap and went through the gap. "I seen them go through the gap; they

went out of sight so I suppose they went on there. I never saw them in the clover field, however."

August Katz testified that he was with Buschke on one such occasion and saw the defendant as he came towards the clover field, and when defendant saw them he ducked between the bushes and the cattle went straight for the gap and out of sight. "They must have gone through the gap; they couldn't have gone elsewhere because I could have seen them if they came back." "I saw defendant drive the cattle towards that gap." "When defendant saw us he just walked behind the bushes. The cattle kept right on going. I suppose they went on the clover field." "They must have went through the gap because we could see on the east side of the fence and couldn't see on the north side. If they had come out on the east side we would have seen them; there is a strip of woods on the north side of the clover field so that we couldn't see them there."

Another witness testifies to have seen, on some other occasion, the defendant's cattle in the clover field, but there is no testimony tending to show that the defendant was then present or knew of it.

The judge charged the jury with reference to the wilful trespass as follows:

"There is no question between plaintiff and defendant but that the defendant's cattle did at times get upon the plaintiff's clover field. This question goes farther than merely to ask whether the cattle got on the plaintiff's pasture. The real inquiry is whether the defendant wilfully brought it about that his cattle pastured on the plaintiff's field. If, for instance, the defendant did in fact drive his cattle through the gap, then there would be no question but that the defendant would be guilty of a wilful trespass.

"The defendant had a right to turn his cattle into any of his own fields; and the mere fact that they strayed from his own fields through a gap or a defective place in the line fence to those of the plaintiff—even though the defendant knew the fences were down—would not be a wilful trespass. It would be a wilful trespass if the defendant purposely, in

any wise or in any manner, drove or guided his cattle to the gap in the fence that they might get through the gap and pasture on plaintiff's pasture. *It would also be a wilful trespass if he knew that his cattle had discovered the clover field, and were certain to return if they were given the chance, to turn them out of his barnyard towards the gap and knowingly allow them to walk direct to the clover field.*

"The defendant of course had the right to drive his cattle from his barnyard to any portion of his premises and pasture them there, and the defendant was under no legal obligation to telephone the plaintiff that cattle were getting on the clover field."

The defendant moved to change the answer of the verdict whereby the jury found that there had been such wilful trespass, and also for judgment notwithstanding the verdict, or that the same should be set aside and a new trial granted. The court granted judgment for the plaintiff for the amount of the damages, and from such judgment the defendant has appealed.

For the appellant there was a brief by *Gad Jones* and *Philip Lehner,* both of Princeton, and oral argument by *Mr. Lehner.*

E. F. Kileen of Wautoma, for the respondent.

ESCHWEILER, J. Sec. 1391, Stats., provides for the building of partition fences and also provides that "owners of lands who do not maintain and keep in repair lawful partition fences shall not be entitled to recover any damages whatever for trespasses by the animals of owners of any adjoining lands with whom partition fences might have been maintained if such lands had been inclosed."

The jury found, and there can be no dispute under the testimony, that there was not a proper statutory partition fence between these two farms. The obligation rested on the plaintiff, if he desired to recover damages for the straying of defendant's cattle from the adjoining farm upon plaintiff's own farm, to see to it that a proper partition fence was

built and maintained. It is therefore entirely immaterial whether or not the proceedings of the fence viewers were taken according to the statute or not. Whether the blame for the failure to have the entire fence completed should be placed upon plaintiff or defendant, or both, is immaterial under the plain reading of the statute. There being no such fence at the time of the injury to plaintiff's clover field, he is barred by the statute from recovering damages occasioned by the mere straying of the adjoining owner's cattle upon his farm.

The plaintiff, however, asserts that this statutory bar to the right to recover does not apply in the case of a wilful, intentional trespass by the owner of the cattle driving them upon another's land, and the defendant the contrary.

The common-law absolute liability of the owner of such domestic cattle for damage done by his default in so caring for them that they stray from his lands to those of another is still the law of this state except as modified by statute. *Metropolitan C. Ins. Co. v. Clark,* 145 Wis. 181, 183, 129 N. W. 1065.

It is well recognized, however, that provisions in a fence statute such as we have here are intended to apply only to such trespasses as are occasioned by the natural propensity of the animals themselves and not to a positive, intentional act of the owner or keeper of such animals whereby the trespass is occasioned. As to such wilful trespasses the absolute liability of the common law making the owners of such cattle liable for consequent damage must be held to be still in force. *Light v. U. S.* 220 U. S. 523, 31 Sup. Ct. 485; *Mower v. Olsen,* 49 Utah, 373, 164 Pac. 482; *Vanderford v. Wagner,* 24 New Mex. 467, 174 Pac. 426; *Frostenson v. Marshall,* 25 New Mex. 215, 180 Pac. 287; *Harrison v. Adamson,* 76 Iowa, 337, 41 N. W. 34.

There must, however, be more than a mere turning of cattle loose from the defendant's own barnyard onto his own fields, though he has reasonable probability for believing

that if left to themselves they will wander from his into the field of his neighbor, in order to justify a finding of such wilful trespass as will support a recovery for the consequent damages, where, as here, there has not been maintained a lawful partition fence. The italicised portion of the charge to the jury quoted in the statement of facts therefore stated the rule too broadly.

We have examined the record in this case and are satisfied that the evidence is not sufficient to sustain the finding that there was a wilful and intentional trespass by defendant in driving his cattle through the gap and upon the plaintiff's clover field. For that reason we think the motion of the defendant for a directed verdict or the subsequent motion for judgment notwithstanding the verdict should have been granted, either of which would have resulted in a dismissal of the complaint upon the merits. We are satisfied that that should now be done.

By the Court.—Judgment reversed, and the cause remanded with directions to dismiss the complaint.

HEMMIS, Appellant, vs. CONSOLIDATED WATER POWER & PAPER COMPANY, Respondent.

February 9—March 8, 1921.

Deeds: Construction: Reservation of flowage rights: Adverse possession: Use not inconsistent with easement.

1. If there is ambiguity as to the descriptive part of a deed, the court may consider the surrounding circumstances to ascertain the meaning of the instrument; but where the intent of the grantor is clearly expressed, the deed cannot be changed by evidence of extrinsic circumstances.
2. In construing deeds, every word and clause is to be taken into consideration.
3. A deed reserving to the grantor the "use of all of the water power, water flowage and dam privilege forever," is *held* to preclude the grantee from recovering from the grantor's assignee damages for overflow caused by a dam situated below the land conveyed.

4. A reservation clause in a deed being in effect a grant by the grantee should be construed most favorably to the original grantor.
5. The use of land for pasturage for eight or nine years and thereafter for no other use than to cut wood and trees is not an adverse user for twenty years such as to deprive the owner of an easement entitling him to use the land for water flowage, such use of the land not being inconsistent with the easement.

APPEAL from a judgment of the circuit court for Portage county: BYRON B. PARK, Circuit Judge. *Affirmed.*

A. L. Smongeski of Stevens Point, for the appellant.

For the respondent there was a brief by *Goggins, Brazeau & Goggins* of Wisconsin Rapids, and oral argument by *Theo. W. Brazeau.*

JONES, J. This action is for trespass for flooding the plaintiff's lands by a dam located at Biron, six or seven miles below the land in question. Plaintiff owns three tracts which may be designated as lots 1, 2, and 3. It is claimed that about six acres in lot 1, about twelve acres in lot 2, and about fifty-three acres in lot 3 were affected by flowage caused by defendant's dam. Since 1914 the dam has been raised from time to time. The present height is about nineteen feet and it is proposed to increase the height to twenty-one feet. It was agreed that for the purpose of the trial the jury should assess the plaintiff's future damages with the water held at defendant's dam at that height. In their special verdict the jury found that the plaintiff sustained no damages as to lots 1 and 2 by the raising of the dam, and that neither of said lots would be flooded by raising the dam to maintain a head of twenty-one feet, and that there would be no damage to the remainder of plaintiff's farm by the contemplated raising of the dam. They found that plaintiff sustained damages as to lot 3 by raising the dam in 1916 in the sum of $300; that 43.4 acres of this lot would be flooded by raising the dam to the height of twenty-one feet; that the pres-

ent market value of the land so to be flooded is $35 per acre; and that there would be no depreciation of the remainder of plaintiff's farm by reason of such taking.

We shall first consider the claim for damages as to descriptions 1 and 2, since a wholly different defense is pleaded as to description number 3. It is undisputed that lots 1 and 2 were low and had always been swampy; that water flowed upon them from adjacent higher land and from springs. The contour map introduced in evidence showed their average elevation above the bottom of the flume at the dam to be about twenty-eight feet.

It was claimed by respondent that the testimony showed that when the dam is raised to twenty-one feet it would leave the land on lots 1 and 2 six feet or more above the water level. The appellant claimed that it would be somewhat less. It seems clear that the land is of little or no value unless it can be drained. There was a clear conflict of evidence on this subject, some of the evidence tending to show that drainage would be practicable after the raising of the dam. Although the trial seems to have been fairly conducted, the jury found against the plaintiff on the issues raised as to these two lots. We cannot say that there was any such want of credible evidence in support of the verdict that the verdict should be set aside.

Most of the testimony and most of appellant's argument related to lot 3. On February 18, 1896, one J. P. Malick conveyed this lot to the appellant, and the deed contained this clause: "Excepting and reserving for myself and my assigns the use of all of the water power, water flowage and dam privilege forever." It was stipulated at the trial that the defendant, *Consolidated Water Power & Paper Company*, was at the time of the commencement of this action owner of all the rights reserved by J. P. Malick to the water power, water flowage and dam privileges.

Although on the face of the verdict the plaintiff was entitled to a judgment for the damages found, the trial court

held that he was precluded from a recovery by the reservation clause in his deed, and judgment was rendered for the respondent dismissing the complaint. Plaintiff's counsel argue that the reservation clause above quoted conferred no right to flow any part of his land except by a dam erected at or near the premises conveyed; that the real meaning of the clause is that a water-power and dam privilege only were reserved.

Evidence was received to show that near the premises in question there were rapids and a fall in the river of about four feet in a distance of about three fourths of a mile, and that at one time there had been a survey to ascertain how much head could be developed. It was suggested that a head of twelve feet could have been developed, but this would have flowed all of the plaintiff's land. The trial judge expressed the view that a right to build a dam at this place would be of no value to any one.

We recognize the rule that if there is ambiguity as to the descriptive part of a deed the court may consider the surrounding circumstances to ascertain the meaning of the instrument. But it is also the rule that where the intent is clearly expressed it cannot be changed by evidence of extrinsic circumstances. It is also a familiar rule that in construing deeds every word and clause is to be taken into consideration.

As we construe the deed, the grantor reserved to himself and his assigns not only the water-power and dam privilege but also "water flowage." There is no language of limitation or restriction as to the time or place of exercising the right to build a dam or to cause the flowage.

Appellant's counsel argue that the right to build a dam and the right to flow are inseparable and that the reservation gave no right to flow his land except by a dam on or near the land conveyed, but the authorities do not seem to support this claim. It does not appear that the dam as built or contemplated will cause any greater flow of water on plaintiff's

land than would be caused by a dam nearer his premises. In the absence of any restriction or limitation the reservation should be given its natural interpretation, not confining the grantor and his assigns to the location of the dam to any particular place. Gould, Waters, § 304; *De Witt v. Harvey*, 4 Gray, 486; *Bradley v. Warner*, 21 R. I. 36, 41 Atl. 564; *Kilgore v. Hascall*, 21 Mich. 502.

It is claimed by the appellant that the reservation clause in the deed should be construed against the grantor; but in *Green Bay & M. C. Co. v. Hewitt*, 66 Wis. 461, 465, 29 N. W. 237, Mr. Justice ORTON said: "If there is a reservation in the deed, it being in effect a grant by the grantee, it should be construed most favorably to the original grantor," and there is much authority for this view. 2 Devlin, Real Estate (3d ed.) § 979.

Appellant's counsel claim that if respondent ever had a right to flow this land with its dam the right was lost by the adverse user by the appellant for twenty years. Bearing on this subject the appellant testified:

"When I got the place it was low and swampy; it was not swampy, it was wet. Wet on the south of lot 3. We call it a swamp at home for a by-word. It was known as a swamp; we called it that way. Shortly after I got it I put a fence around it, running way to the river. I pastured it; I had a cow mired in there. And eight or nine years after I bought it I tore down the fence, and I have never pastured it since or tried to put a fence up there since. I never put a fence around the other part of my land, the low land in the northeast of the southeast and the northwest of the southeast. I quit using all of that low land as a pasture and never used it since as such. I never put a plow on the land. I have never raised any agricultural produce of any kind. The only use I have ever made of the land at all in any way is to go down there and cut wood and trees and pasture. I quit pasturing shortly after I tried it; after I had the cow mired. The cow was mired about eleven or twelve years after I had it, something like that; anyhow it was before the defendant, *Consolidated Water Power & Paper Company*, flowed the land."

There was nothing in this kind of use of the land which was inconsistent with the easement claimed by respondent. So long as the defendant and its predecessors in title did not exercise the right of flowage they were at liberty to use the land for that purpose. The owner of the fee had the right to use the land as he did. Such user was no notice to defendant that it could not have the benefit of the easement when needed and was not hostile. *Butterfield v. Reed,* 160 Mass. 361, 35 N. E. 1129; *Roberts v. Sioux City & P. R. Co.* 73 Neb. 8, 102 N. W. 60; *Chicago, M. & St. P. R. Co. v. Snyder,* 120 Iowa, 532, 95 N. W. 183.

By the Court.—Judgment affirmed.

ESCHWEILER, J., dissents.

PIETRASZWICZ and others, Respondents, vs. PIETRASZWICZ, Appellant.

February 9—March 8, 1921.

Executors and administrators: Right to possession of assets of estate: Jurisdiction of circuit court over estates: Descent: Title to personalty.

1. Although the circuit court has concurrent jurisdiction with the county court as to matters involving the estates of decedents. the circuit court is as much bound to refuse to assume jurisdiction when lack of power to grant adequate relief in the county court is not clearly shown as though there were an absence of jurisdiction in the circuit court.
2. The legal title to personal property of an intestate vests upon his death in his estate represented by an administrator, and title devolves on those ultimately entitled to share in the personal property after administration and by the final decree of the proper court administering the estate, rather than by operation of law, as does the title to realty.
3. Where petition had been made in the county court for probate of decedent's will which left all his property to his wife, the circuit court is without jurisdiction to enjoin, at the suit of the other heirs at law of decedent alleging the invalidity of

the will, the widow's sale of the personal property, as plaintiffs had an adequate remedy by applying to the county court for appointment of a special administrator under sec. 3810, Stats., who would have power to collect the assets of the estate under sec. 3811.

4. Until either a special or a general administrator or executor, holding the legal title to the assets of the estate, does some act which is an invasion, or threatens to do that which amounts to an injury and infringement, of the equitable beneficial interests of the legal distributees, the primary right of possession and control over such assets is in such representative.

APPEAL from a judgment of the circuit court for Shawano county: EDGAR V. WERNER, Circuit Judge. *Reversed.*

The plaintiffs were the adult children by a former marriage of one Steve Pietraszwicz, who for over twenty years had been the third husband of the defendant *Paulina.* Since the marriage of the deceased and the defendant they had lived in the home situated upon a farm owned at the time of the marriage by the defendant and they conducted the farm together. At first she owned forty-two acres and subsequently added twenty acres to it. Sometime after the marriage another twenty acres was purchased and title was taken in the name of the deceased husband, who died the owner thereof. On March 23, 1919, and at their home the deceased executed an instrument alleged to be his will whereby he gave all his property, real and personal, to defendant. He died a few hours thereafter. On March 27th petition was made for the proof of such instrument as the last will and testament of the deceased, and on March 29th an order was made in the county court of Shawano county upon such petition fixing a time for the hearing thereof and a further order made giving notice to creditors. At about the same time the defendant gave public notice, by posting bills, of an intention to sell on the premises on April 5th the sixty-two acres of land of which she was the owner and also a large amount of personal property consisting of a team of horses, cattle, poultry, grain, hay, farm machinery, and household furni-

ture. On April 4th a temporary injunction was obtained in this action restraining such sale until further order of the court. Thereafter and by stipulation said sale was permitted to be had and the proceeds derived therefrom deposited with the clerk of the court below.

The complaint alleged, among other things, that the plaintiffs, together with the defendant, were the heirs at law of the deceased, Steve Pietraszwicz. It also recited that he died leaving certain real and personal property, specifying the property referred to in the proposed auction sale. That for some time prior to the death of Steve Pietraszwicz he was mentally incompetent to make a will; that by the undue influence of defendant and through a conspiracy entered into between her and one Martin Kelpinski said Steve was induced to sign his name or make his mark to the instrument alleged to be his last will; that the defendant caused said alleged or pretended will to be filed with the county judge of Shawano county; that the said will had not yet been offered for probate nor had any administrator been appointed; that the defendant by virtue of the said pretended will claims ownership and the right of possession to all the property of which the said Steve died possessed; and set forth the proposed auction sale of April 5th. That each of the plaintiffs as an heir of the said Steve Pietraszwicz was the owner of an undivided one-sixth interest in all of the personal property, being the same that the defendant threatened to sell, and that if said sale was permitted the property would be so disposed of as to get beyond the reach and control of the plaintiffs, rendering to each of them an injury and damage for which they have no adequate remedy at law.

The plaintiffs demanded judgment enjoining the sale of the personal property and asking the court to take jurisdiction of the estate of the said Steve Pietraszwicz and administration of the same and that the pretended will be declared null and void and of no effect, and that Steve Pietraszwicz be declared to have died intestate, and that the plaintiffs be

allowed to recover damages as they may show they have sustained, together with their costs and disbursements.

Upon the trial the court permitted an amendment to the complaint alleging in effect that the will had not been properly executed, on the alleged ground that the testator had not seen the witnesses affix their signatures to the attestation clause.

The defendant asserted the proper and due execution of the will and her rights thereunder; that before the commencement of the action the will was duly filed in the county court of Shawano county and petition duly made for the probate of said will, and an order made for a hearing thereon in the following May; that the county court of Shawano county had assumed full and complete jurisdiction of the entire matter, and that the plaintiffs have an adequate remedy in such county court without invoking the authority of the circuit court.

During the trial the defendant renewed her objection to the jurisdiction of the court.

The court made his findings of fact reciting, among other things, the filing of a petition in the county court for the probate of the said will; that the defendant and Martin Kelpinski, through ignorance of the law and in good faith, assumed that the defendant owned all the personal property and that the deceased left no personal property and proceeded with the auction sale of the personal property that was on the farm; the further proceedings in the county court as to fixing the time for the hearing of the petition for the probate of the will and the giving of notice to creditors; the claims which had been filed in said county court (indicating as to one such that it was a question as to whether it had been filed in due time, and as to the bill for funeral expenses that it was a proper claim against the estate, but that its allowance is within the jurisdiction of the county court). A copy of the alleged will was set out and that no further proceedings were had upon it in the county court;

that the defendant as widow was entitled to all her rights as against the property of the deceased pursuant to sec. 3935, Stats.; that after the temporary injunction restraining the proposed auction sale the parties had stipulated to permit the sale to proceed, and the deposit of the net proceeds with the clerk of the circuit court subject to and abiding the result of this trial; and that such proceeds, amounting to $1,212.63, were now in the custody of the said clerk; that such proceeds include the sale of the household furniture and some other articles belonging to defendant.

The twentieth finding was as follows:

"The court does not determine and is unable to determine from the evidence what portion of the personal property belongs to the deceased and what to the defendant, but the evidence establishes the fact that the deceased did own some of the personal property at the time of his death, which the defendant attempted to sell without title and without authority of law."

The court also found that the deceased was of sound mind and memory and capable of making a will at the time of the execution of the instrument purporting to be his last will, and that no undue influence was exercised by the defendant or any one else in connection with its execution, and that he intended to convey all his property to the defendant.

The following were also made a part of the findings:

"(23) That the instrument purporting to be the last will and testament of said Steve Pietraszwicz, deceased, was not executed with the formality required by law, in this, that the evidence is conclusive as shown by the physical facts and circumstances established by the evidence that it was impossible under the circumstances for the deceased to have seen the witnesses sign the said instrument purporting to be the last will and intended to be his last will, and that said witnesses thereto did not sign said instrument in the presence of said Steve Pietraszwicz or in the presence of each other, but that the said witnesses signed same entirely out of the said Steve Pietraszwicz's range and vision and not in his presence."

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The court also found that the deceased was of sound mind and memory and capable of making a will at the time of the execution of the instrument purporting to be his last will, and that no undue influence was exercised by the defendant or any one else in connection with its execution, and that he intended to convey all his property to the defendant.

The following were also made a part of the findings:

"(23) That the instrument purporting to be the last will and testament of said Steve Pietraszwicz, deceased, was not executed with the formality required by law, in this, that the evidence is conclusive as shown by the physical facts and circumstances established by the evidence that it was impossible under the circumstances for the deceased to have seen the witnesses sign the said instrument purporting to be the last will and intended to be his last will, and that said witnesses thereto did not sign said instrument in the presence of said Steve Pietraszwicz or in the presence of each other, but that the said witnesses signed same entirely out of the said Steve Pietraszwicz's range and vision and not in his presence."

"(24) That the creditors of said Steve Pietraszwicz, deceased, are interested in said issues involved herein and are entitled to certain rights if they establish their claims filed in the county court and are not parties to the action."

"(25) That it was necessary to enjoin the sale of said property to protect the rights of all parties interested and that the county court did not have as ample power and authority under the law to restrain said sale, but that the county court has full power and authority to assume jurisdiction on all matters not herein determined."

As conclusions of law the court held (1) that the preliminary injunction be confirmed and made final to carry out the full spirit and intent of the law as determined by the court; (2) that the instrument purporting to be the last will of said deceased was not executed as required by law and is null and void; (3) that the clerk of the circuit court is ordered to pay to the public administrator for Shawano county, who had been appointed by the county court of said county, the said proceeds from the sale; (4) that all the issues not determined in the cause shall be and are certified back to the county court in and for said county for further proceedings according to law; (5) that the plaintiffs recover from the defendant disbursements consisting of clerk's and sheriff's fees and $25 attorney fees and no other costs, and directed judgment in accordance therewith. From which judgment the defendant has appealed.

P. J. Winter of Shawano, for the appellant.

For the respondents there was a brief by *Martin, Martin & Martin,* and oral argument by *Gerald F. Clifford,* all of Green Bay.

ESCHWEILER, J. The circuit court should have promptly refused to act in this matter. This was its plain duty from a mere inspection of the complaint and was rendered still more certain at the close of the plaintiffs' testimony. There is in this entire record an absolute want of any peculiar or extraordinary circumstances whereby it was shown that a

full, adequate, and complete remedy could not or would not have been afforded by a resort to the orderly course of procedure in the county court. Such lack appearing is a practical equivalent to a want of jurisdiction in the circuit court.

Conceding that, under the broad equitable powers of a court of *nisi prius* such as is the circuit court, there exists a concurrent jurisdiction with the county court as to matters involving the estates of decedents, nevertheless it is well and long established by a series of decisions of this court that the circuit court is as much bound to refuse to assume jurisdiction when such lack of power to grant adequate relief in the county court is not clearly shown as though there were an absence of jurisdiction in the circuit court. *Meyer v. Garthwaite,* 92 Wis. 571, 573, 66 N. W. 704; *Burnham v. Norton,* 100 Wis. 8, 13, 75 N. W. 304; *Washington Co. v. Schrupp,* 139 Wis. 219, 222, 120 N. W. 856; *Wisdom v. Wisdom,* 155 Wis. 434, 437, 145 N. W. 126; *Komorowski v. Jackowski,* 164 Wis. 254, 258, 159 N. W. 912; *Lehman v. Weiner,* 167 Wis. 428, 429, 167 N. W. 806; *Guardianship of Knoll,* 167 Wis. 461, 469, 167 N. W. 744.

The nature of the peculiar circumstances which may support the exercise of jurisdiction by the circuit court is indicated in such cases as *Gianella v. Bigelow,* 96 Wis. 185, 71 N. W. 111; *Lindemann v. Rusk,* 125 Wis. 210, 104 N. W. 119; *Eisentraut v. Cornelius,* 134 Wis. 532, 115 N. W. 142; *Merrill v. Comstock,* 154 Wis. 434, 143 N. W. 313; *Jones v. Citizens' S. & T. Co.* 168 Wis. 646, 656, 171 N. W. 648. None of these cases, however, afford any support for the proceedings such as were taken in the court below resulting in its judgment.

The complaint disclosed, and the evidence confirmed it, that the plaintiffs had no such present legal interest in this personal property as would warrant their bringing this action. If Steve Pietraszwicz died intestate, as plaintiffs claim he did from their attack upon his alleged will, then the legal title to such personal property vested upon his death in

his estate represented by an administrator. To those ultimately entitled to share in the personal property title devolves after administration and by the final decree of the proper court administering the estate rather than by operation of law, as does the title to real estate. *McKenney v. Minahan,* 119 Wis. 651, 658, 97 N. W. 489; *Stehn v. Hayssen,* 124 Wis. 583, 588, 102 N. W. 1074; *Karel v. Pereles,* 161 Wis. 598, 604, 155 N. W. 152; *Palmer v. O'Rourke,* 130 Wis. 507, 110 N. W. 389; *Schoenwetter v. Schoenwetter,* 164 Wis. 131, 134, 159 N. W. 737.

The plaintiffs, if fearful of any possible loss or destruction of personal property belonging to the deceased, had ample and adequate remedy by applying to the county court for the appointment of a special administrator under sec. 3810, Stats. Such special administrator, by sec. 3811, has power to collect the goods and chattels of a deceased and preserve the same for the executor or administrator to be afterward appointed. Such special administrator, if appointed, or the regular administrator or executor when appointed, is the proper party to proceed to collect and preserve the personal property of a deceased. Until such official of the court, either special or general administrator or executor, so holding the legal title to the assets of the estate of the deceased does some act which is an invasion, or threatens to do that which amounts to an injury and infringement, of the equitable beneficial interests of the legal distributees, the primary right of possession and control over such assets is in such official representative of the estate. *Rowell v. Rowell,* 122 Wis. 1, 9, 99 N. W. 473.

Upon the record it appears that the county court had before the commencement of this action already assumed jurisdiction of the estate of the deceased. It clearly appears that there was ample time intermediate the death and proposed auction sale for any one concerned to have applied to the county court for the appointment of a special administrator, and ample time for such special administrator to

commence an action, if any such were necessary to preserve such property. These proceedings, therefore, should have been halted at the very threshold, and the issuing of the injunction restraining the sale, the proceeding to hear the alleged issues, and the entry of a judgment in form as was done in this case were each and all done by the court under such a situation that it amounted to a complete want of proper jurisdiction, and they must for that reason be each and all set aside. To hold otherwise would be to permit or even encourage an unseemly scramble by those who might claim to be ultimately interested in the personal property of a deceased to resort to other than the orderly procedure for the settlement of estates.

After a long and bitterly contested trial the evidence of the plaintiffs as to the sole ground upon which they claim or the court appears to have entertained jurisdiction, namely, that the defendant was proceeding to dispose of property that belonged to the deceased rather than to herself, was of so slight a texture that the court was unable, as appears from his twentieth finding, *supra,* to determine just what personal property belonged to the deceased and that was being sold by the defendant. A search of the record discloses no testimony upon which a finding that any definite article of personal property which the defendant was claiming as her own did in fact belong to the deceased at the time of his death. There is some testimony that shortly after their marriage, at least twenty years prior to his death, he had a team of horses, a binder, and possibly other personal property, some of which he took to defendant's farm at the time he commenced to live there. There is no testimony, however, upon which could be supported a finding that there was any of this property still belonging to the deceased at the time of his death. The plaintiffs utterly failed to meet the burden of proof required of them on this essential fact, even if such fact had been sufficient to warrant the circuit court entertaining jurisdiction.

In view of the disposition that is being made of this case and the setting aside and vacating the judgment in its entirety and all the proceedings, it is unnecessary to pass upon or determine other questions raised upon this appeal. We cannot refrain, however, from saying that a careful consideration of the testimony in this case falls far short of impressing us, as it appears to have done the trial court, that the alleged last will of the deceased was not executed according to law, on the ground, as stated by the trial court, that it was impossible under the circumstances for the deceased to have seen the witnesses sign the instrument presented as his will.

The circuit court having had no proper justification for its proceeding to a trial and determination in this case, there was no warrant for its impounding, as was done, the proceeds of the auction sale; still less for its direction that such impounded proceeds be turned over to the public administrator, who under no view of the law should have been made the custodian. There is no basis, therefore, for withholding such proceeds of the auction sale from the defendant.

If the estate of the deceased had or has any rights or claims to any of such personal property disposed of by defendant or any portion of the proceeds derived therefrom, such questions may still be determined in proper proceedings brought by the proper parties and without being affected in any way by what was attempted to be done in this action or by the present disposition thereof by this court.

It follows therefrom that the judgment of the court below should be reversed, the action dismissed, and the money proceeds from the auction sale be and hereby are directed to be paid over to the defendant.

By the Court.—Judgment reversed, and cause remanded with directions to dismiss the proceedings and pay over the funds to defendant.

BELL, Respondent, vs. AMERICAN INSURANCE COMPANY, Appellant.

February 9—March 8, 1921.

Insurance: Automobile damage: Construction of policy: Rule of ejusdem generis: Exception: Tipping over as collision.

1. In a policy insuring an automobile owner against damage resulting to his automobile by accidental collision during the policy period with "any other automobile, vehicle, or object," the use of the word "object" came within the exception to the rule of *ejusdem generis*, and, the specific words embracing all objects of their class, the general words must bear a different meaning from the specific words or be meaningless. Language in *Wettengel v. United States "Lloyds,"* 157 Wis. 433, intimating a contrary holding, withdrawn.
2. Insurance contracts should be construed most strongly against the insurer, but they are subject to the same rules of construction applied to the language of any other contract. It is not permissible to impute an unusual meaning to language used in a contract of insurance any more than to the language of any other contract.
3. A policy insuring plaintiff against damage resulting to his automobile "by being in accidental collision during the period insured with any other automobile, vehicle, or object" was not an obligation to indemnify plaintiff for damage to his car when, while on the highway, one side of the car gradually settled into the ground and the car tipped over, striking the ground to its damage, such casualty not being a "collision" as the word is commonly understood.

APPEAL from a judgment of the superior court of Douglas county: SOLON L. PERRIN, Judge. *Reversed.*

Action to recover damages on an insurance policy insuring plaintiff against damage to his automobile by being in accidental collision with any other automobile, vehicle, or object. On the 14th day of September, 1919, plaintiff was driving his automobile down Twenty-first street in the city of Superior. He turned on Logan avenue with the intention of backing out and turning around. He had crossed the crosswalk by six or eight feet, practically stopped his car, the power being in neutral, preparatory to backing out.

One side of the car gradually settled into the ground and the car tipped over. Plaintiff seeks to recover the damage resulting to the car by its coming into contact with the ground at the time of the upset. The plaintiff recovered judgment in the lower court, and the defendant brings this appeal.

For the appellant there was a brief by *Tenney, Tenney & Reynolds* of Madison, and oral argument by *E. J. Reynolds.*

For the respondent there was a brief by *Grace, Fridley & Crawford* of Superior, and oral argument by *C. R. Fridley.*

OWEN, J. The policy insures plaintiff against damage resulting to his automobile "by being in accidental collision during the period insured with any other automobile, vehicle, or object." Judgment was rendered in the lower court on the theory that the forcible contact of the automobile with the street upon the occasion of the upset constituted a collision within the meaning of the policy provision referred to. The appellant contends that the contact resulting from the upset is not a collision within the meaning of the terms of the policy, and that is the sole question before us.

It was held in *Wettengel v. United States "Lloyds,"* 157 Wis. 433, 147 N. W. 360, that the language of this policy provision did not cover damages resulting to an automobile by its running off the main road and down a bank into a river. In that case the doctrine *ejusdem generis* was applied to the words "automobile, vehicle, or object," and it was held that to entitle plaintiff to recover the collision must have occurred with another automobile, vehicle, or some similar object. If the doctrine of that case is to be followed the judgment must be for the defendant. It is urged by the appellant that the application of the doctrine *ejusdem generis* was unnecessary to the conclusion there reached, and that it was inadvertently applied and has no proper application to the words as used in the policy

before us. It is pointed out that the doctrine of *ejusdem generis* does not apply when the specific words embrace all objects of their class so that the general words must bear a different meaning from the specific words or be meaningless; that an automobile is a vehicle, and the term "vehicle" includes everything in which persons or things can be carried or transported, hence the words "automobile" and "vehicle" embrace all objects of their class, and the word "object" means a different kind of an object or it means nothing.

By the rule of construction known as *ejusdem generis,* general words following particular words are limited to other species of the same genus. "The particular words are presumed to describe certain species and the general words to be used for the purpose of including other species of the same genus. The rule is based on the obvious reason that if the legislature had intended the general words to be used in their unrestricted sense they would have made no mention of the particular classes." 36 Cyc. 1120. It has been held that the rule does not apply where the specific words embrace all objects of their class so that the general words must bear a different meaning from the specific words or be meaningless. *United States C. Co. v. Cooper,* 172 Ind. 599, 88 N. E. 69. We think the reason supporting the rule also dictates the exception, and that the exception applies to the words of this policy provision. Unless the word "object" as here used be construed as including an object of a different class it is meaningless, as the term "vehicle," it seems to us, includes every species within the genus. We are disposed to construe this provision as sufficiently broad to include a collision with objects other than automobiles or vehicles, and withdraw the contrary intimation made in *Wettengel v. United States "Lloyds," supra.* This requires us to determine whether the forcible contact of the automobile with the ground, as a result of the upset, constitutes a collision.

With the definitions of lexicographers as a basis, it is easy to demonstrate that the incident resulting in damage to plaintiff's automobile constituted a collision. Thus, "A collision is the 'meeting and mutual striking or clashing of two or more moving bodies, or of a moving body with a stationary one.' Century Dict. 'Object' is defined to be 'that which is put, or which may be regarded as put, in the way of some of the senses; something visible or tangible.' Webster, Dict. An automobile is an object. Upon the overturning of an automobile its forcible contact with the earth constitutes a 'mutual striking or clashing of a moving body with a stationary one.' Hence the forcible contact of the automobile with the earth on the occasion of the upset constituted a collision." Upon its face this appears to be good logic, but the conclusion is neither convincing nor satisfying. One instinctively withholds assent to the result. The reason is that it makes a novel and unusual use and application of the word "collision." We do not speak of falling bodies as colliding with the earth. In common parlance the apple falls to the ground, it does not collide with the earth. So with all falling bodies. We speak of the descent as a fall, not a collision. In popular understanding a collision does not result, we think, from the force of gravity alone. Such an application of the term lacks the support of "widespread and frequent usage."

While it is true that insurance contracts should be construed most strongly against the insurer (*French v. Fidelity & C. Co.* 135 Wis. 259, 115 N. W. 869; *Kelly v. Fidelity Mut. L. Ins. Co.* 169 Wis. 274, 172 N. W. 152), yet they are subject to the same rules of construction applied to the language of any other contract. It is a fundamental rule that the language of a contract is to be accorded its popular and usual significance. It is not permissible to impute an unusual meaning to language used in a contract of insurance any more than to the language of any other contract. The incident causing the damage to the automobile here in

question is spoken of in common parlance as an upset or tip-over. If it were the purpose to insure against damage resulting from such an incident, why should not such words, or words of similar import, have been used? We cannot presume that the parties to the contract intended that an upset should be construed as a collision in the absence of a closer association of the two incidents in popular understanding.

The term "collision" has not received frequent consideration by courts. A number of cases in which the term has been considered have been collated by the industry of counsel and cited to our attention. We here preserve a reference to the following for the future convenience of bench and bar: *Newtown Creek T. Co. v. Ætna Ins. Co.* 163 N. Y. 114, 57 N. E. 302; *London Assurance v. Companhia De Moagens Do Barreiro,* 167 U. S. 149, 17 Sup. Ct. 785; *Cline v. Western Assur. Co.* 101 Va. 496, 44 S. E. 700; *Harris v. American C. Co.* 83 N. J. Law, 641, 85 Atl. 194; *Hardenbergh v. Employers' L. A. Corp.* 80 Misc. 522, 141 N. Y. Supp. 502; *Stuht v. United States F. & G. Co.* 89 Wash. 93, 154 Pac. 137; *O'Leary v. St. Paul F. & M. Ins. Co.* (Tex.) 196 S. W. 575; *Graham v. Ins. Co. of N. A.* 220 Mass. 230, 107 N. E. 915. None of these cases, however, deal with a situation similar to the one here presented, unless it be *Harris v. American C. Co., supra.* That case was referred to in *Wettengel v. United States "Lloyds,"* 157 Wis. 433, 147 N. W. 360, where it was said that it had but advisory value in this court and its soundness was doubted. A further consideration of the subject does not dispel the doubts there expressed.

For the purpose of showing a practical construction of the contract on the part of the company, the plaintiff proved by the agent who delivered the policy in question that the company provided, and sometimes used, another form covering the damage resulting from collision, which specifically excluded "damage caused by striking any portion of the

roadbed or by striking the rails or ties of street, steam, or electric railroads." It is argued that because in some instances the company used a form specifically excluding damage caused by striking any portion of the roadbed, or by striking the rails or ties of street, steam, or electric railroads, a purpose is indicated to assume responsibility by the use of the one form for damage excluded by the express terms of the other. Without stating whether, in our opinion, this testimony proves, or tends to prove, a practical construction of the contract here in question by the company, we are clear that it does not tend to prove a practical construction in harmony with that for which respondent contends. As we construe the clause quoted, it has no reference to damage caused by upsets, but it does exclude damage caused by projecting portions of the roadbed in the course of travel. It is common knowledge that an automobile traveling along a highway frequently strikes an unevenness of surface in the roadbed sufficient to do damage to the automobile, and this, we think, is the damage excluded by the clause in the other form sometimes used by the company. Such circumstance was held not to constitute a collision in *Dougherty v. Ins. Co. of N. A.* 38 Pa. Co. Ct. Rep. 119, and it seems not improbable that the form exempting such liability is sometimes used by defendant to avoid just such contentions as were there made. We do not think the introduction of the second form throws any light on the proper construction of the contract before us.

We are of the opinion that the damages sustained were not the result of a collision, and that the judgment should be reversed.

By the Court.—Judgment reversed, and cause remanded with directions to enter judgment dismissing the plaintiff's complaint.

JONES and others, Appellants, vs. BRANDT and another, Respondents, and F. C. AUSTIN DRAINAGE EXCAVATOR COMPANY, imp., Appellant.

February 10—March 8, 1921.

Bills and notes: Holder in due course: Proof as to date of negotiation: Presumption: Fraud: Parol evidence as to representations: Expressions of opinion: Reliance on representations: Sales: Acceptance of goods: Chattel mortgages: Penalty upon unlawful sale.

1. In an action on notes given for the price of a dredge, brought by the assignees of the seller, in which the buyer proved that the purchase had been induced by fraudulent representations, the assignees, having procured the notes from the seller, whose title was defective under sec. 1676—25, Stats. 1915, had the burden of proving, under sec. 1676—29, that they acquired the notes in due course for value under sec. 1675—51; and in sustaining such burden they were required to prove that they acquired the notes before they became due under sec. 1676—15.
2. Sec. 1676—15, Stats. 1915, providing that unless an indorsement is dated after maturity every negotiation of an instrument is deemed *prima facie* to have been effected before maturity, does not relieve the holder of a note taken from a person whose title is defective from the burden of affirmatively establishing that the note was indorsed and delivered before it was due.
3. Testimony that the sale of the dredge was fraudulently induced by misrepresentations as to its capacity and equipment is admissible to prove fraud, notwithstanding a provision of the contract that it embodied the entire understanding between the parties and that the seller's liability should not be affected by any statement or representation not contained therein.
4. Representations that the dredge was of a kind and construction such as to properly do the work desired and that it was equipped with an engine of a particular kind and capacity, are actionable as against the contention that they were mere expressions of opinion.
5. Though mere promises are not a basis for fraud, and though ordinarily fraud cannot be predicated on mere expressions of opinion, expressions of opinion may, under some circumstances, be treated as statements of facts.
6. Acceptance of the dredge, induced by the assurance of the agent of the seller that the dredge would be made to work satisfactorily, did not constitute a waiver of defects.

7. Where the mortgagor consented to the sale of mortgaged property under a chattel mortgage, he could not recover a penalty under sec. 2316*c*, Stats. 1915, on the ground that the statute relating to chattel-mortgage sales had not been complied with, the taking not being hostile to him.

ROSENBERRY and ESCHWEILER, JJ., dissent.

APPEAL from a judgment of the circuit court for Juneau county: JAMES O'NEILL, Circuit Judge. *Modified and affirmed.*

For the appellants there was a brief by *Goggins, Brazeau & Goggins* of Wisconsin Rapids, and oral argument by *Theo. W. Brazeau.*

For the respondents there was a brief by *Grady & Farnsworth* of Portage, and oral argument by *W. H. Farnsworth.*

JONES, J. This is an action brought on promissory notes against *Brandts,* copartners, who for convenience will be called the defendants, who had entered into a contract with the *Austin Company* (hereinafter called the company) for purchasing a dredge, and which was impleaded and against which defendants pleaded a counterclaim or cross-complaint. Since the two causes of action are entirely different they will be separately treated.

The plaintiffs were doing business in Chicago, and had an agreement with the company by which they undertook to buy accounts, indebtedness, or claims due the company from its customers. On July 27, 1916, plaintiffs took an assignment of the account due from defendants for the dredge which they had purchased. On the same date they purchased the nine notes to be given by the defendants to the company. These notes were not then executed, but were executed on August 2d and delivered to the company in consideration for the dredge purchased. It was the understanding when said assignment was made that the notes were to be turned over to the plaintiffs. When the assignment was made the indebtedness represented by the agreement was $5,000. The plaintiffs then paid the company eighty per cent. of this amount, less one per cent. per month

from the date of the assignment to the date of payment. The remaining twenty per cent. was to be paid upon collection.

By a general written contract it had been provided that the plaintiffs should pay eighty per cent. of the face of accounts to be turned over, less discount; that the company should act as plaintiffs' agent in the collection of accounts so assigned, and as remittances were received should turn over the original checks or drafts, the company guaranteeing that the accounts should be paid over at maturity, and if not so paid it would pay to plaintiffs the face on demand and the accounts should thereupon be re-assigned to it; that certain services were to be rendered by plaintiffs to the company for which plaintiffs were to receive one per cent. for each thirty days or part thereof that accounts should remain unpaid to plaintiffs. The agreement also provided for an adjustment of their accounts and that plaintiffs, when they had received the amount advanced by them plus the agreed compensation, should re-assign to the company all accounts uncollected.

The amount paid to the company on the execution of the assignment above described was $3,725. The evidence does not disclose on what day the notes were indorsed to the plaintiffs or when they came into plaintiffs' possession. It does appear that they had been turned over before December 19, 1916, but by that time some of the notes were overdue and plaintiffs had notice. At the trial the plaintiffs offered the notes duly indorsed and rested their case. The defendants then offered a large amount of testimony tending to show fraud and a breach of warranty on the sale of the dredge, for the purpose of showing that plaintiffs were not holders in due course and to establish their counterclaim against the company. In considering whether the plaintiffs were holders in due course we shall assume that the notes were obtained by means of fraudulent representations and will discuss that subject later.

The trial court held that under the statute as it existed

when the account was assigned the plaintiffs were not holders in due course. That statute was as follows:

"Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt, discharged, extinguished or extended, constitutes value; and is deemed such whether the instrument is payable on demand or at a future time. But the indorsement or delivery of negotiable paper as collateral security for a pre-existing debt, without other consideration, and not in pursuance of an agreement at the time of delivery, by the maker, does not constitute value." Sec. 1675—51, Stats. 1915.

It is not necessary to consider whether the plaintiffs were not holders of the notes for value on the ground that the indebtedness was assigned to them prior to the execution of the notes and because the notes were not executed in extinguishment, discharge, or extension of the debt. It might be urged with some force that, in view of the testimony that it was agreed upon the assignment of the account to deliver the notes when executed, they were not given as collateral security for a pre-existing debt. This point is only briefly discussed in the brief of respondents and not at all in that of appellants.

There is another ground on which we base our decision that plaintiffs are not holders in due course. We are sustaining the verdict of the jury and the separate findings of the court by which it was determined that the defendants were induced to buy the dredge and give the notes in question by means of fraudulent representations. Under the facts so found, when the company negotiated the notes their title was defective within the meaning of the statute, sec. 1676—25, Stats. 1915. That being so, the burden was on plaintiffs to prove according to sec. 1676—29 that they acquired the notes in due course. In order to maintain this burden it was necessary to prove that they became the holders of the notes before they were overdue. As before stated, there was no proof of the time when the indorsements were made or when the notes were delivered to plaintiffs.

Sec. 1676—15, Stats. 1915, provides: "Except where an

indorsement bears date after the maturity of the instrument, every negotiation is deemed *prima facie* to have been effected before the instrument was overdue."

This raises the question whether it suffices when one has taken a note from one whose title is defective to simply offer the note and the indorsement, or whether, notwithstanding the statute just quoted, he should offer further affirmative proof that he is a holder in due course. Under the same statutes it has been held in Iowa that where the holder takes a note from one whose title is defective the burden rests upon him to show that he is the holder in due course, and that this involves something more than the mere presumption arising from an indorsement regular in form. *O'Connor v. Kleiman,* 143 Iowa, 435, 121 N. W. 1088; *Bank of Bushnell v. Buck Bros.* 161 Iowa, 362, 142 N. W. 1004. The same principle was declared in *Murphy v. Estate of Skinner,* 160 Wis. 554, 152 N. W. 172, where different statutes were construed. In *Hodge v. Smith,* 130 Wis. 326, 110 N. W. 192, Mr. Justice MARSHALL, speaking for the court, said:

"But the rule in this state and generally, independent of the written law, is that where circumstances exist rendering the title of the original holder defective, or showing fraud in obtaining the paper, the burden is on the second holder to go further than to merely produce such paper. He cannot rely upon the mere presumption which obtains, generally, but must carry the burden of showing that he is a holder in due course by proving facts sufficient to establish it." Page 336.

Since there is no proof that the notes were indorsed or delivered before due, we must hold that the plaintiffs have not sustained the burden of proof imposed by the statute.

We now come to the counterclaim or cross-complaint of defendants against the company. The agreement between the company, a corporation of Chicago, and the defendants, of Juneau county, Wisconsin, for the purchase of the dredge was very elaborate and we shall only enumerate its main features. After providing for the execution of the notes

and mortgage and for the enforcement of the agreement by sale of the property in case of default in payment, there was a guaranty of good materials and workmanship, that the machine should show a capacity to excavate ordinary soil that can be readily spaded at the rate of thirty yards an hour, and an agreement to replace broken or defective parts on notice. It was provided that the defendants should examine the machine on its arrival and promptly give notice of defects, giving the company reasonable time to make alterations to meet the objections. There were detailed provisions for a trial of the machine, the company's agent being present, at which time any objections were to be made in writing, and after their being remedied by the company an acceptance was to be signed in the form set forth in the contract. It was agreed that in case it should be found after the trial that the machine had not the capacity stated or that the defects were not removed, defendants might reject the machine and that the notes should be returned. It was provided that there should be no claims for damages for latent defects, loss of earnings or services; that the company should have full opportunity to make repairs; that no representation or warranty, express or implied, as to the capacity of said machine or its fitness for any special work, or otherwise, or of or relating to said machine, should be made by first party unless therein expressly set forth. It was agreed that title should remain in the company until the notes were paid and that a chattel mortgage should be executed. The agreement also had the following clause:

"This agreement embodies the entire understanding between the parties hereto, and their liability hereunder shall not be affected by any statement or representation by either party to the other prior to or at the time of the execution hereof and not contained herein."

There was considerable evidence of the oral representations made before and at the time of sale which was received over the objection of the company. One of the defendants

testified that he was told by the representative of the company that "he would build us a dredge that we could take our hats off to" and guaranteed it to fulfil the terms of the agreement to work in that soil; that they had many machines out in different states that were successfully operating in such soil and that he hadn't any complaint yet of this make or type of machine and that this machine would be built especially good and strong to do the work that they had; that it would move ahead by its own power; that the engine was a gas engine, that it would use kerosene entirely, only gas for starting. It was represented that the engine was to be of sufficient power to do the work expected of it and that the machine was to be brand new. There was evidence that the company knew the nature of the soil in which the dredge was to operate. One of the defendants testified that it was stated by the company's representative that the machine would be satisfactorily built, stout enough to stand the work; that they had machines out that were working in number one shape; that the traction mechanism on this machine was supposed to move ahead by its own power, that it was all right, strong enough, and everything to move ahead; that it was supposed to start on gasoline and then burn kerosene.

The testimony showed that the plaintiffs received at the office of the company a statement or specifications describing the machine in which the following representations were made:

"Machine can be taken down in three days; machine can be erected in three days. . . ." "The frame has been so designed to take care of all possible twist or tension resulting from uneven ground travel. . . ." "The A frame is securely guyed by tie rods to rear of main frame. . . ." "The boom is constructed of structural steel framing, spread at base and so proportioned and braced as to be rigid in every respect. . . ." "The power for operating is supplied by a kerosene engine of ample capacity for operating all actions either independently or simultaneously and is connected."

Appellants assign as error the admission of testimony as to the representations made at the time of the sale of the dredge. It is urged that the admission of the evidence violated the parol-evidence rule and that it was especially objectionable by reason of the clause in the contract purporting to exclude such representations. This testimony was offered and admitted on the theory that it tended to prove the allegations of the cross-complaint that the representations were fraudulently made and for the purpose of inducing defendants to enter into the contract.

To support their contention counsel cite *Jones v. Keefe,* 159 Wis. 584, 150 N. W. 954; *State v. Kenosha Home Tel. Co.* 158 Wis. 371, 148 N. W. 877; *Seitz v. Brewers R. M. Co.* 141 U. S. 510, 12 Sup. Ct. 46. In the first two cases no question of fraud was involved; in the third case it is said in the opinion there is no pretense of any fraud, accident, or mistake.

Appellants' counsel also cite and rely on the following cases: *Edward Thompson Co. v. Schroeder,* 131 Minn. 125, 154 N. W. 792; *General Electric Co. v. O'Connell,* 118 Minn. 53, 136 N. W. 404; *Elliott S. Co. v. Green,* 35 N. Dak. 641, 160 N. W. 1002. But as we read these cases they do not support the claim made. In all of them the representations were held admissible to show fraud in inducing the making of the contract, and in two of them the written contract contained clauses attempting to exclude such evidence.

It is argued that the representations only related to the warranties in the written agreement. The only warranties in the very elaborate agreement were that the machine would excavate thirty yards an hour and that it was of good workmanship and material. The representations above stated relate to various collateral facts not mentioned in the agreement.

We cannot concur in the view that a party to a contract can exclude fraudulent representations made to induce the

contract itself by inserting a clause that the agreement shall be the sole evidence of the transaction. Such a theory would permit the most flagrant frauds by an easy device. It is the well settled rule of this state that it is competent to show by parol that a contract was entered into relying on fraudulent representations. *Gross v. Drager,* 66 Wis. 150, 28 N. W. 141; *Bank of Evansville v. Kurth,* 167 Wis. 43, 166 N. W. 658; *Hurlbert v. T. D. Kellogg L. & M. Co.* 115 Wis. 225, 91 N. W. 673; *Hannon v. Kelly,* 156 Wis. 509, 515, 146 N. W. 512.

It is urged by appellants' counsel that the representations were not actionable because they related solely to future events or were mere expressions of opinion. It was also urged that this was a machine to be manufactured and not one already in existence. The testimony already quoted shows that this was represented to be a type of machine which had been successfully operated. It was as claimed by respondents' attorneys not a machine to be built upon special order but one of regular manufacture. From the testimony the defendants had the right to assume that the machine was in existence though not fully assembled. One of the defendants testified that when they were in Chicago they wanted to go to the factory to see the machine but the company's agent would not take them to see it. It is unnecessary to repeat or discuss in detail the testimony already referred to. We are satisfied that there were such statements concerning matters both of fact and opinion that they were properly submitted to the jury. Some of the statements related to existing facts as to which plaintiffs had, or ought to have had, superior knowledge, and they were statements on which defendants had the right to rely.

The jury and the court found that it was represented that the dredge was of a kind and construction such as to properly do the work desired; that the machine was equipped with a kerosene engine of ample capacity for operating all motions either independently or simultaneously; that it was equipped

with a traction mechanism sufficient to propel or move it by means of the power of the engine; that the machine could be set up or taken down in three days; that the defendants relied on the representations and that they were false.

While it is true that mere promises are not a basis for fraud, and that ordinarily fraud cannot be predicated on mere expressions of opinion, yet it is well settled that statements taking the form of expressions of opinion may under some circumstances be treated as statements of facts. *Miranovitz v. Gee,* 163 Wis. 246, 157 N. W. 790; *Karls v. Drake,* 168 Wis. 372, 170 N. W. 248; *Rogers v. Rosenfeld,* 158 Wis. 285, 149 N. W. 33; *Warder, B. & G. Co. v. Whitish,* 77 Wis. 430, 46 N. W. 540; 20 Cyc. 17.

In *J. H. Clark Co. v. Rice,* 127 Wis. 451, 465, 106 N. W. 231, Mr. Chief Justice CASSODAY, speaking for the court, said:

"As a general rule, a mere expression of opinion or belief as to the value or quality of an article sold, if so intended and understood, is not a representation of fact, and, though false, does not amount to fraud. The mere fact that a statement takes the form of an expression of opinion, however, is not always conclusive. Whenever there is any doubt as to whether it is made as a mere expression of opinion or as a statement of fact, the question must be determined by the jury or court."

No serious claim is made by appellants' counsel that the dredge corresponded with the representations which were made, and we conclude that the verdict of the jury and the findings of the court on this branch of the case are sustained.

It is claimed by appellants' counsel that defendants waived any right to complain of defects in the dredge by accepting it. There were two written acceptances of the dredge signed by defendants and prepared by the company's agent while he was at the place where they were attempting to operate the machine. The testimony shows that the agent well knew at these times that the dredge fell far short of complying with the agreement, and that these so-called acceptances, one

of which was signed on Sunday, were given in consideration of his promises as agent of the company that the machine would be made to work satisfactorily. The trial court found as follows on this subject:

"That said acceptances and letters were signed upon the condition, understanding, and with the assurance on the part of the company that it would nevertheless stand back of the machine and see that it was made to fulfil said representations and warranties, and without any intent on the part of the defendants *Brandt* to waive their right to insist upon its so doing."

For this finding there was ample proof.

We are satisfied that there was no release or waiver of the defendants' rights to claim damages for the fraudulent representations, and no such acceptance as precludes them from maintaining their counterclaim. *Svoboda v. Barta,* 169 Wis. 338, 172 N. W. 719. There are numerous cases in this state which support the view that the facts found in this case would not constitute an acceptance waiving a recovery where a breach of warranty or rescission is claimed. *Walter A. Wood M. & R. M. Co. v. Calvert,* 89 Wis. 640, 62 N. W. 532; *Fox v. Wilkinson,* 133 Wis. 337, 113 N. W. 669; *Lorenz v. Hart-Parr Co.* 146 Wis. 261, 131 N. W. 446; *J. I. Case T. M. Co. v. Johnson,* 140 Wis. 534, 122 N. W. 1037; *Greene v. Curtis A. Co.* 144 Wis. 493, 129 N. W. 410. For at least equal reason such facts would not prevent recovery for fraudulent representations. See extended note, L. R. A. 1918A, 113.

The notes given by defendants were accompanied by their chattel mortgage on the dredge and this mortgage was assigned by the company to the plaintiffs as part of their arrangement. Defendants failed to pay these notes which had been indorsed, and plaintiffs in December commenced proceedings to foreclose the mortgage. There was a sale of the dredge under the mortgage and an affidavit was filed purporting to comply with sec. 2316*c*, Stats. But the court found that it was not a compliance, and appellants' counsel

do not seriously question this finding. The court also found that there was no voluntary surrender of the dredge and that the seizure was hostile. As a conclusion of law the court found that this failure satisfied and discharged the claim of plaintiffs, and that defendants were entitled in addition to the penalty of $25 imposed by the statute.

The testimony on this subject was very brief. One of the defendants testified as follows:

"I did not protest against the selling of the dredge. My father did not. I voluntarily let the dredge be taken and sold. I told the people to take it and sell it under the chattel mortgage. . . . I told Mr. Anderson to take the dredge and sell it under the chattel mortgage; that we wouldn't have no more to do with it. I told him that at Necedah the last time he was out there."

Although the statute in question was undoubtedly enacted to prevent abuses which may have been serious, and although like other statutes it is to be enforced by the courts, still it is a harsh statute and if given too strict a construction may work serious injustice to parties acting in perfect good faith. In construing the statute in a former case Mr. Justice KERWIN said:

"It seems quite clear that the taking contemplated by this statute is a taking *in invitum* under and by virtue of the power to take and reduce to possession as given in the mortgage. The taking and sale under the mortgage within this statute means a hostile taking by virtue of the right to dispossess the mortgagor of his possession and property under the power given in the mortgage. The statute, we think, is capable of this construction without doing violence to its language, and in view of its highly penal character it should receive such construction." *Hammel v. Cairnes*, 129 Wis. 125, 107 N. W. 1089.

We are not able to construe the testimony above quoted in the same manner as the trial court, and we therefore hold that the taking was not hostile but was consented to by the defendants, that the debt was not discharged thereby, and that no penalty was incurred.

With abundant caution respondents' counsel pleaded facts

which would call for relief either on the ground of fraudulent representation or rescission or breach of warranty as the proof might develop. In the argument and briefs there has been considerable discussion of the law as to breach of warranty and rescission which in view of our conclusion does not require attention. The jury assessed the damages suffered by the defendants by reason of the false representations in the sum of $4,500. There had been paid to the company to apply on the account $1,000. The dredge was sold under the chattel mortgage before the action was brought and was bid in by the company for the sum of $1,000. Some proof was given by defendants of damages for the expense incurred in testing the dredge, but the trial court held that the evidence was so indefinite that it should not be submitted to the jury. We find no error in such action.

The court rendered judgment in favor of the defendants dismissing the complaint, for costs against the plaintiffs and the company, for damages against the company in the sum of $1,000 and interest, and for the penalty of $25 against the plaintiffs based on the statute and the holding that no proper affidavit was made after the chattel-mortgage sale. In view of our ruling that the taking of the property under the chattel mortgage was not hostile, the judgment should be modified by excluding the penalty, but in other respects it should be affirmed.

By the Court.—Judgment modified as indicated in the opinion, and as so modified affirmed. No costs to be taxed in this court, except clerk's fees to be paid by the plaintiff appellants.

ROSENBERRY, J. (*dissenting*). Inasmuch as there are a number of questions decided in this case, I feel that it is my duty to state my reasons for dissenting from the judgment of this court.

While the *Austin Company* contends that evidence as to conversations between the parties prior to the making of the contract was inadmissible, its first contention is that, if

admissible, the facts established thereby are not sufficient to form a basis of fraud. With this contention I agree. The undisputed evidence shows that the *Brandts* knew that they were purchasing a machine to be thereafter manufactured and delivered.

By the special verdict the jury found that the *Austin Company* induced the *Brandts* to purchase the dredge and execute the contract in question by making the following representations:

(a) That the dredge in question was of a kind, character, and construction so as to properly do the work for which Brandt & Son desired it.

(b) That the engine with which it was equipped was a kerosene engine of ample capacity to operate all motions either independently or simultaneously.

(c) That the dredge was equipped with a traction mechanism sufficient to propel or move it by means of the power of the engine.

The jury found that the defendants *Brandt* relied upon the representations (a), (b), and (c) and that the representations were false.

The contract and specifications prescribed the kind of engine with which the dredge was to be equipped and also provided the details as to the traction mechanism, and specified the amount of work which the dredge should be capable of doing in a given time when completed. If the dredge as manufactured and delivered did not comply with the contract and specifications, the contract provided the manner in which the dissatisfaction of the *Brandts* was to be expressed. While a promise to do an act in the future may or may not be a contract for the breach of which damages can be recovered, mere nonperformance of the promise is not a fraud. *Sheldon v. Davidson*, 85 Wis. 138, 55 N. W. 161; *Tufts v. Weinfeld*, 88 Wis. 647, 60 N. W. 992; *Louis F. Fromer & Co. v. Stanley*, 95 Wis. 56, 69 N. W. 820; *Seymour v. Cushway*, 100 Wis. 580, 76 N. W.

769; *Milwaukee B. C. Co. v. Schoknecht,* 108 Wis. 457, 84 N. W. 838; *James Music Co. v. Bridge,* 134 Wis. 510, 114 N. W. 1108.

I find no statements not covered by the contract that are shown by the verdict or findings to be untrue.

The trial court found, in accordance with the undisputed facts, that the *Brandts* never attempted to return the dredge but pursued their rights under the contract to the end. Having elected to keep the goods, the *Brandts* might have recovered by way of recoupment their damages for breach of warranty (sec. 1684*t*—69, Stats.). In their answer the defendants *Brandt* allege that they had offered to return the goods and had done all things necessary upon their part to effect a rescission of the contract. Upon the trial no attempt was made to sustain the allegations of the answer in this respect. Upon the first trial of the dredge the defendants *Brandt* signed an acceptance in the following language:

"Gentlemen: Pursuant to the contract between yourself and ourselves dated May 23, 1916, for one Austin dry land dipper dredge, the undersigned has this day witnessed the demonstration of said machine and accepts the same as being in full compliance with said contract and without further obligation on your part except as noted on the back of this acceptance."

On the back of the acceptance appeared a notation that certain castings and parts were to be furnished, that a dipper of different capacity was to be supplied, if requested.

In October there was a second trial of the dredge and a second written acceptance was made, which bears date on Sunday, October 9, 1916. As a condition of signing that acceptance the defendants *Brandt* demanded and received a credit of $240 for repairs to the boom. After the dredge had been tried and the acceptances signed the *Brandts* sought to have the time of payment of the notes given therefor extended. *Tunis Brandt* testified:

"I came to Grand Rapids after these notes were placed

for collection to see about settling the matter up. I made no objection at that time that there was any fraud. All I wanted was an extension of the time on my note."

There was no claim that the signatures in the acceptances were procured by fraud. The trial court found that the signatures were, however, qualified by agreement of the parties to the extent that the *Austin Company* agreed to stand back of the machine.

While the answer of the defendants *Brandt* contained a counterclaim for damages for breach of warranty, the case was not tried upon that theory. In my opinion the judgment should be reversed and the case sent back for a new trial, first, as to whether or not there was a qualified acceptance of the machine; and, if so, whether there was a breach of warranty and the amount of damages sustained by the defendants *Brandt* by reason thereof.

I am authorized to say that Mr. Justice ESCHWEILER concurs in this opinion.

WOOD and others, Respondents, vs. COLEMAN and wife, Appellants.

February 10—March 8, 1921.

Deeds: Undue influence: Evidence: Appeal: Exceptions not considered.

1. In an action to set aside a deed from a ninety-five-year-old father to his daughter and her husband, where the evidence showed that the deed was executed when it was apparent that the grantor was dying and that the transaction was concealed from other relatives, findings of the trial court that the grantor was incompetent and that the deed was a result of undue influence are sustained.
2. Exceptions will not be considered where rulings favorable to the appellant would not change the decision on the issues litigated, nor will they be considered where no grounds are stated, no propositions argued, and no principles of law discussed.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

The action was brought to set aside a deed by which George Wood, deceased, conveyed certain property in the town of Windsor to his daughter, *Anna M. Coleman,* and her husband, *Thomas G. Coleman.* The plaintiffs are heirs at law of George Wood, deceased.

George Wood died intestate on the night of May 12, 1919, at the city of Madison, Wisconsin. At the time of his death he was nearly ninety-five years of age. Between 12 o'clock noon and 1 o'clock p. m. of the day of his death he made the deed in question. Two causes of action are set forth in plaintiffs' complaint, alleging entire incapacity of George Wood at the time of affixing his mark; entire lack of acknowledgment of the instrument by George Wood; entire lack of delivery of the deed; and fraud and undue influence in obtaining the deed.

Defendants plead a general denial, alleging that George Wood was of sound mind and memory at the time of the conveyance; that the conveyance was the free act and deed of George Wood; that on the day in question George Wood knew all of his children and grandchildren and nephews and nieces and knew all about his property and the location thereof and gave directions as to what should be done with the same; that George Wood was fully cognizant of the contents of the conveyance, the same having been read over to him several times by defendant *Thomas G. Coleman* before the execution and delivery thereof by George Wood to *Thomas G. Coleman* and *Anna M. Coleman;* that the instrument was duly acknowledged and recorded according to law; that the conveyance was made pursuant to a former and previous agreement; and that the execution was in conformity with the previous agreement made during the forepart of April, 1919, prior to the coming of George Wood into the home and residence of the defendants.

The court found that at the time the deed conveying the property in question to defendants was signed and recorded George Wood did not possess sufficient mental capacity to make a valid transfer of his property and that the execution of the deed was procured through undue influence on the part of the defendants. Judgment was entered setting aside the deed. This is an appeal from such judgment.

For the appellants there was a brief by *F. K. Shuttleworth* of Madison, attorney, and *Luce & Wilson* of Elkhorn, of counsel; and the cause was argued orally by *Mr. Shuttleworth.*

For the respondents there was a brief by *Gilbert, Ela & Heilman* of Madison, and oral argument by *Emerson Ela.*

SIEBECKER, C. J. A study of this case convinces us that the trial court's findings of fact are well sustained by the evidence. The opinion of the court gives a full and comprehensive statement of the ultimate facts established by the evidence. The conclusions of facts shown by the evidence are so fully stated therein that nothing is left to be added by way of substance or comment. We adopt it in its entirety as expressive of the views of this court:

"There are many circumstances connected with this case that require explanation on the part of these defendants. The grantor was a man nearly ninety-five years of age, who had been crippled and dependent upon others for care for many years. He was taken to the home of the defendants, where he was given the best of care and the kindest of attention. The defendants directed the preparation of the deed on Friday, without calling the scrivener to the home or giving him any opportunity to communicate with decedent. It was apparent to those who saw decedent on Saturday, Sunday, and Monday that he was rapidly approaching the end of life. On Saturday he was breathing hard and spoke few words. On Sunday he was gasping for breath and too sick to speak, and gave no sign of recognition when his son-in-law bade him good-by. On Sunday the deceased himself sent word to his oldest son that he was

dying. On Monday forenoon the decedent did not speak to one of his sons who came to see him, or give him any sign of recognition. On Monday afternoon one of the defendants' witnesses, who was a trained nurse, recognized the fact that he was a dying man. Yet defendants did not attempt to secure the execution of the deed until Monday noon. They said nothing about the deed to the other relatives of decedent who came to see the old man. But within an hour of the time when the last of these relatives had left the home of the defendants they called in the neighboring grocer, who had a notary's commission, and he signed the acknowledgment of this deed. It is apparent from his testimony that he had no conception of the duty of a notary in taking an acknowledgment under such circumstances and that he did nothing to ascertain whether decedent knew what he was signing or whether he was in such mental condition as to be able to acknowledge such an instrument. The defendants did not tell any of the relatives of the decedent of the execution of these papers until about two months after his death, and then they suggested that they would divide the property described in the deed with one of the children of the decedent if she would stand with them in this contest.

"Under familiar rules this set of circumstances established *prima facie* that the deed was procured by undue influence, 'which must be met by affirmative evidence establishing good faith of the transaction.' *Nyhagen v. Markham,* 168 Wis. 91, 95, 169 N. W. 283. There is no evidence which satisfies the court of the good faith of the transaction here in question. The testimony of the witnesses to the deed and of the daughters of the defendants as to what took place at the time of the execution of the deed does not satisfy the court because of the demeanor of these witnesses and of the inherent improbability that a dying man, who gave his son no sign of recognition during the forenoon, would at noon of the same day give specific detailed directions as to the stamping and recording of the deed as testified to by them.

"The decedent did not have the power to comprehend his property even as early as the fall of the year preceding his death in May. He then suggested the necessity of selling the land here in question in order to keep himself out of the poorhouse, when he in fact had abundant personal property

to supply all his needs without selling the realty. He did doubtless state to those not members of the defendants' family that he desired to give the property here in question to the defendants, but this was after he had come to live with them and had come under their influence. He had previously expressed the determination to divide his property among his children equally. The evidence is voluminous. It will serve no useful purpose to attempt to review it in further detail."

We have examined the forty-eight exceptions presented by appellant to the rulings of the trial court on admission and rejection of evidence. It is our opinion that none of them constitute prejudicial error in the case. The exceptions are too numerous for detailed discussion, and are not of a nature to require treatment, because a ruling on the points embraced in the exceptions, favorable to appellant, would not have changed the decision upon the issues litigated. As to most of these exceptions, the observations made in *Roedler v. C., M. & St. P. R. Co.* 129 Wis. 270, 109 N. W. 88, are applicable:

"No grounds are stated, no propositions argued, and no principles of law discussed. Obviously, such enumeration of exceptions is not what is contemplated by the rules of this court as to what a brief should contain. Mere exceptions, not deemed worthy of specific consideration by counsel, cannot be expected to receive consideration from this court."

By the Court.—The judgment appealed from is affirmed.

WIEDNER, Respondent, vs. NATIONAL FISHERIES COMPANY, Appellant.

February 10—March 8, 1921.

Frauds, statute of: Sales: Part performance: Telegrams between offerer and his agent: Sufficiency.

1. An allegation in the complaint of the seller of a carload of fish that the defendant buyer refused to accept the car involved after it was partly loaded, or to pay for it, negatived part performance of the contract of sale.
2. A telegram to his principal from the agent for defendant, the alleged buyer of the fish from plaintiff, that he could buy the fish for twelve cents and had offered eleven and one-half, and that a $500 deposit was demanded, and a reply from defendant to pay a half cent more if necessary, that the $500 was wired, and to ship the car on a given date, are *held* not to show, taken together, a completed contract in writing, satisfying the statute as to the price agreed on, since to reach the conclusion that the price was twelve cents a pound recourse to parol testimony that the contents of the buyer's telegram were conveyed to plaintiff is necessary.

APPEAL from an order of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Reversed.*

Action to recover damages for the breach of a contract for the purchase of a carload of fish. The complaint contains appropriate allegations showing that the contract was entered into in this manner: On December 16, 1919, defendant sent a telegram to plaintiff saying, "Mr. Mack, our representative, is expected to call to see you Wednesday." January 20, 1920, Mack sent this telegram to defendant: "Can buy *Wiedner's* fish for twelve cents. Have offered eleven and one-half. Five hundred dollars deposit demanded." January 21, 1920, defendant telegraphed Mack: "If necessary pay one half cent more. Five hundred dollars wired. Ship car on 23d;" and on the next day it wired him, "Have not sent funds yet. Try cancel *Wiedner* shipment for this week." The complaint alleges that the contents of the telegram of January 21st from defendant to

Mack was orally communicated to plaintiff; that he prepared and had the fish ready for shipment on the 23d; that defendant refused to receive it, to his damage in the sum of $535.50, and that the total value of the carload at twelve cents per pound was $3,213 in addition to cost of boxes. From an order overruling its general demurrer to the complaint the defendant appealed.

For the appellant there was a brief by *Richmond, Jackman, Wilkie & Toebaas* of Madison, and oral argument by *Harold M. Wilkie.*

For the respondent there was a brief by *Kroncke & Sauthoff,* attorneys, and *H. H. Puetz,* of counsel, all of Madison; and the cause was argued orally by *Mr. Puetz.*

VINJE, J. The allegation in the complaint that "the defendant corporation refused to accept said car of carp after the same was partly loaded, or to pay for the same," negatives a part performance of the contract and that cannot be relied upon to take it out of the statute of frauds. Do the telegrams themselves without the aid of parol testimony show a completed contract? The trial court held that "the telegrams of the defendant, the party sought to be charged, clearly disclose that the plaintiff is the seller and the defendant the buyer, that the property is a car of fish belonging to plaintiff which is to be shipped on January 23d, that the price is twelve cents per pound, and that the terms of payment require the immediate deposit of $500." We cannot concur in the conclusion that the telegrams show the price to be twelve cents per pound. To reach that conclusion recourse must be had to the parol testimony that the contents of the telegram of January 21st were conveyed to plaintiff, and then the inference would have to be drawn that plaintiff stood firm as to price. Without that parol link no one can say what terms were agreed upon. In a negotiation for the sale of an article it does not absolutely follow that an agent invested with authority to pay the asking price of the article

will pay such price. The telegram of January 21st implies further negotiations as to price and there is no writing to disclose the result. For that reason an essential part of the contract, namely, the purchase price, is not in writing and the contract falls within the ban of the statute.

By the Court.—Order reversed, and cause remanded with directions to sustain the demurrer.

EAU CLAIRE SAND & GRAVEL COMPANY, Appellant, vs. CLEVELAND and another, Respondents.

February 10—March 8, 1921.

Workmen's compensation: Failure to comply with safety order: Increased compensation: Pulleys exposed to contact.

Where part of the machinery of a sand and gravel crane consisted of a long belt carrier driven by a pulley thirty-six inches in diameter and reached by a platform, such pulley was "exposed to contact" within the meaning of Order No. 2 of the industrial commission requiring all pulleys over eighteen inches in diameter which are exposed to contact to be guarded; and hence a workman caught in the unguarded pulley while applying dressing was properly awarded increased compensation by way of penalty because his injury resulted from the failure to comply with the orders of the commission.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

Workmen's compensation. The respondent *Cleveland* was injured October 2, 1919, while in the employ of the plaintiff. Upon a proper proceeding before the *Industrial Commission* the *Commission* awarded the respondent *Cleveland* compensation amounting to $1,959.15, and awarded him the further sum of $368.48 increased compensation by way of a penalty assessed by reason of the failure of the plaintiff to guard its machinery in accordance with the orders of the *Industrial Commission.* The *Commission* found

"that the applicant's injury was proximately caused by a failure of the respondent to comply with safety orders of the *Industrial Commission,* namely orders 1 and 2, and that by reason thereof this applicant is entitled to additional compensation from the respondent equal to fifteen per cent. of the primary amount, or $368.48."

This action was begun to review the award of the *Commission* giving respondent *Cleveland* the increased compensation. Upon the trial in the circuit court the award of the *Commission* was confirmed, and from the judgment of confirmation the plaintiff appeals.

For the appellant there was a brief by *John B. Fleming* and *A. H. Shoemaker,* both of Eau Claire, and oral argument by *Mr. Shoemaker.*

For the respondent *Railroad Commission* there was a brief by the *Attorney General* and *Winfield W. Gilman,* assistant attorney general, and oral argument by *Mr. Gilman.*

ROSENBERRY, J. The respondent *Cleveland* was employed at a sand and gravel crane. A part of the machinery consisted of a belt carrier about 200 feet long which was constructed on an incline and was operated by a motor. The belt was driven by a pulley and as it moved upward carried sand in the sag of the belt. The belt was twenty inches wide and the pulley at the upper end was twenty-two inches wide and thirty-six inches in diameter. A platform was built near the pulley at the upper end of the belt, and it was at this pulley that the respondent *Cleveland* was injured. At the time of his injury he had gone to the platform with a stick of dressing for the purpose of applying it to the pulley, the belt having stopped. In response to a signal the superintendent stopped the machinery and was then told by the respondent *Cleveland* to start it again. The respondent *Cleveland* continued to apply the dressing to the pulley while the belt was in motion, and in so doing the glove which

he was wearing became fastened to the pulley and his hand and arm were drawn in between the belt and the pulley. The belt and the pulley, at the place where the injury occurred, were unguarded. Order No. 2 of the *Industrial Commission* is as follows:

"All pulleys over eighteen inches in diameter which are exposed to contact must be guarded."

Order No. 1 is in part as follows:

"All belts, ropes, or chain-driving machinery or shafting, and all secondary belts, ropes, or chains; in short, all belts, ropes, or chains exposed to contact, except belts which are so small or those which move so slowly that there is no possibility of danger, must be guarded. . . .

"Note (a) The term 'belt' or 'secondary belts' means belts which transmit power and do not apply to sanding or polishing belts, or belts used for abrasive purposes; such belts must be guarded where possible."

The *Industrial Commission* found that the pulley at which the respondent *Cleveland* was injured came within the provisions of Order No. 2. This finding was confirmed by the trial court. The trial court correctly held that the finding was supported by substantially credible evidence and could not be set aside for that reason. It is contended that the pulley in question is not covered by Order No. 2 because not exposed to contact within the meaning of that order. The circumstances of this case show that it was exposed to contact in the ordinary course of the company's business. We do not think the phrase "exposed to contact" means to continuous or frequent contact, but to contact in the ordinary and usual course of the operation of the plant without regard to its frequency or infrequency. We shall not attempt to determine whether the belt in question transmits power within the meaning of Order No. 1. It is not necessary to a decision of this case.

By the Court.—Judgment affirmed.

FIRST WISCONSIN TRUST COMPANY, Respondent, vs. JOHNSON, State Treasurer, Appellant.

February 10—March 8, 1921.

Banks and banking: Trust company banks: Consolidation: Deposit of securities with state treasurer by consolidated company: Amount required.

Under sec. 2024—*77rr*, Stats., in spite of seeming conflict arising from the broad terms used, on the consolidation of two trust company banks the new corporation takes the place of the old companies, and, succeeding to their assets and assuming their liabilities, succeeds to the ownership of the securities deposited by them under sec. 2024—*77j* with the state treasurer, and need not deposit additional securities, but may withdraw from those theretofore deposited all exceeding the maximum $100,000 deposit required of such a company however large its capital.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

Prior to August, 1919, two trust company banks were existing and transacting business as such in the city of Milwaukee. Each had duly complied with the provisions of sec. 2024—*77j*, Stats., providing for the deposit of an indemnity fund with the state treasurer for the faithful execution of any trust which might be lawfully imposed upon and accepted by them.

The First Trust Company then had a capital stock of $300,000 and a surplus of $200,000. The Wisconsin Trust Company had a capital stock of $500,000 and a surplus of $300,000.

Pursuant to due proceedings by the two companies and under sec. 2024—*77rr*, Stats., a consolidation was effected in August, 1919. The articles of association of the Wisconsin Trust Company were modified by changing the name to the "*First Wisconsin Trust Company.*" The capital stock was made $800,000, and its surplus fixed at $500,000. The shareholders of the two trust companies were to surrender

their respective certificates of stock in exchange for certificates of the new company, share for share.

Negotiations were then had with the defendant state treasurer to have delivered to such *First Wisconsin Trust Company*, plaintiff herein, the securities in excess of the face value of $100,000 thereof which were then in the hands of the state treasurer and theretofore deposited with him by the two trust company banks, and also that the ownership in the remaining $100,000 of such securities be recognized as in the plaintiff. Such negotiations being of no avail this action was brought. The defendant answered admitting all of the allegations of the complaint and praying judgment for dismissal thereof.

Upon such pleadings the parties moved for judgment in their favor respectively. The court made his findings of fact and conclusions of law upon such motions and directed judgment in favor of the plaintiff. From such judgment the defendant has appealed.

The portions of the statute deemed material for consideration in this matter are as follows:

"*Indemnity fund; deposit with state treasurer.* Section 2024—77*j*. Before any such corporation shall commence business it shall deposit with the state treasurer not less than *fifty per centum* of the amount of its capital stock, provided, however, that no such corporation shall be required to deposit *more than one hundred thousand dollars*, such deposit to be in cash, bonds, or mortgages, . . . which cash, bonds, mortgages, or notes and mortgages, or public stocks or bonds shall be approved by the commissioner of banking and *shall be held by the state treasurer in trust as security for the faithful execution of any trust which may be lawfully imposed upon and accepted by it;* such corporation may from time to time withdraw the said securities as well as the cash, or any part thereof; provided that securities or cash of the amount and value required by this section shall, at all times, *during the existence of such corporation remain in the possession of the state treasurer for the purpose aforesaid and until otherwise ordered by a court of competent jurisdiction.* The said treasurer shall pay over to such

corporation the interest, dividends, or other income which he shall collect upon such securities, or he may authorize the said corporation to collect the same for its own benefit. Upon such deposit being made and approved, the state treasurer shall issue a certificate of such fact and an amount equal to the sum stated in such certificate shall remain with him in the manner provided above; *in case the capital stock shall be increased or diminished the amount of such deposit shall be increased or diminished to comply herewith and a new certificate of such fact shall be issued accordingly.*"

"*Corporate powers.* Section 2024—77*k*. Any such corporation shall have the following powers: . . .

"(6) Any such corporation shall have power, in and by its corporate name, to take, receive, hold, pay for, reconvey, and dispose of any effects and property, real or personal, which may be granted, committed, transferred, or conveyed to it with its consent, upon any terms, or upon any trust or trusts at any time, by any person or persons, including married women and minors, bodies corporate, or any court, including the courts of the United States, and to administer, fulfil, and discharge the duties of such trust or trusts for such remuneration as may be agreed upon. . . ."

"*Trust funds; accounts, how kept.* Section 2024—77*m*. Every such corporation shall keep its trust accounts in books separate from its own general books of account. All funds and property held by it in a trust capacity shall, at all times, be kept separate from the funds and property of the corporation, and all deposits by it of such funds in any banking institution shall be deposited as trust funds to its credit as trustee, and not otherwise. Every security in which trust funds or property are invested shall, at once, upon the receipt thereof, be transferred to it as trustee, executor, administrator, guardian, receiver, assignee, or other trustee as the case may be for each particular trust or fund by name and immediately entered in the proper books as belonging to the particular trust whose funds have been invested therein. Any change in such investment shall be fully specified in and under the account of the particular trust to which it belongs, so that all trust funds and property shall be readily identified at any time by any person."

"*Consolidation of trust company banks.* Section 2024—77*rr*. (1) Any trust company bank organized, continued or reorganized under this subchapter may consolidate with

any other similar corporation within the same county, city, town or village in the *manner provided for the consolidation of banks* under section 2024—28*n*; *and in the event of such consolidation the consolidated corporation, by whatever name it may assume or be known, shall be a continuation of the entity of each and all of the corporations so consolidated for all purposes whatsoever, including* holding and performing any and all trusts and fiduciary relations of whatsoever nature of which the corporations so consolidating, or either or any of them, was fiduciary at the time of such consolidation, and also including its appointment in any fiduciary capacity by any court or otherwise, and *the holding, accepting and performing of any and all trusts and fiduciary relations whatsoever as to or for which either or any one of the corporations so consolidating may have been appointed, nominated or designated by any will or conveyance or otherwise, whether or not such trust or fiduciary relation shall have come into being or taken effect at the time of such consolidation.*"

"*Consolidation of banks.* Sec. 2024—28*n*. (1) That any two or more banks located within the same county, city, town or village may, with the approval of the commissioner of banking, consolidate *into one bank under the charter of either existing bank* on such terms and conditions as may be lawfully agreed upon by a majority of the board of directors of each bank proposing to consolidate and be ratified and confirmed by the affirmative vote of the stockholders of each such bank owning at least two thirds of its capital stock outstanding. . . .

"(2) The bank or banks consolidating with another bank under the provisions of the preceding subsection shall not be required to go into liquidation but their assets and liabilities shall be reported by the bank with which they have consolidated; and all the rights, franchises and interests of said banks so consolidated in and to every species of property, personal and mixed, and choses in action thereto belonging, shall be deemed to be transferred to and vested in such bank into which it is consolidated without any deed or other transfer, and the said consolidated bank shall hold and enjoy the same and all rights of property, franchises and interests in the same manner and to the same extent as was held and enjoyed by the bank or banks so consolidated therewith."

For the appellant there was a brief by the *Attorney General* and *E. E. Brossard,* assistant attorney general, and oral argument by *Mr. Brossard.*

For the respondent there was a brief by *Miller, Mack & Fairchild,* and oral argument by *James B. Blake,* all of Milwaukee.

ESCHWEILER, J. It is conceded that the statutory requirements were properly carried out and the plaintiff became a lawfully organized trust company bank.

The defendant contends that the language of sub. (1). sec. 2024—*77rr,* Stats., *supra,* providing that such consolidated corporation "shall be a continuation of the entity of each and all of the corporations so consolidated for all purposes whatsoever," so fixes and preserves the former corporate entities of the two trust company banks that the respective deposits by such former corporations of $100.000 worth of securities with the state treasurer must continue to be held for such corporate entities to the same effect and purpose as before such consolidation.

It is argued that if by the provision quoted above there be now and hereafter sufficient warrant and authority for the corporation which has resulted from the consolidation to step into and fill any trust positions to which either of said prior corporations had been theretofore or shall thereafter be appointed or designated as completely as might have such respective prior corporations, it must then necessarily follow that by preserving such a right a corresponding obligation must continue to keep and preserve, for such prior corporate entities, the securities theretofore required of and deposited by them. Defendant also lays stress upon there being substantial distinction recognized by the several statutes providing for the consolidation of such trust company banks under sec. 2024—*77rr,* Stats., and for the consolidation of banks under sec. 2024—*28n,* viz. that as to the trust company banks there is express provision for a continuation of

the entity of each of the corporations so consolidated and none as to such banks. He also argues that, there being no express authority for the withdrawal of such deposited securities by either of the old corporate entities upon such consolidation or by the new corporation thereafter, there is thereby indicated a legislative intent requiring the continued holding of such respective deposits for such prior and thereafter continued corporate entities. And from either or all of these suggestions, therefore, that the defendant is in duty bound, under the provisions of the statute (sec. 2024—77*j*, *supra*) providing for such deposit of securities, to continue to hold the same until, as therein provided, he is otherwise ordered by a court of competent jurisdiction.

The situation presented is a peculiar one and we have no help in its solution from any decisions of this or other jurisdictions. Such authorities as *Central R. & B. Co. v. Georgia*, 2 Otto (92 U. S.) 665, and *Bergdorf's Will*, 206 N. Y. 309, 99 N. E. 714, as to the effect of consolidation or merger of corporations, are under statutes different from those before us and are therefore not persuasive either way in the present problem.

We think the trial court was right in the determination at which he arrived and for the following reasons: The amount of such securities required from any trust company bank is fixed ratably as to the capital stock up to the maximum of $100,000. Such securities are not pledged for any particular trust or trusts but for the general performance of its trust obligations, so that no particular *cestui que trust* has at any time a fixed or particular interest therein. While no provision is made for the withdrawal of the former deposits upon such consolidation, neither is there any provision that such consolidated trust company bank shall make a new deposit of securities. To require these two separate deposits to be so continued, as contended for by the defendant, and to prevent the present new trust company bank from having any recognized ownership therein, would of necessity and

logically require it, in order to lawfully do business under sec. 2024—*77j*, Stats., to make a new and separate deposit of $100,000 in securities. Evidently it must either be in a position to assert title to the securities which belonged to the prior corporate entities or else now deposit new and additional securities. To so require plaintiff as such new trust company bank to make such new and separate deposit as a condition precedent to its lawfully commencing business under the said statute does not seem a justifiable construction.

The evident primary purpose of sec. 2024—*77rr* is to authorize one company, after such consolidation, to exist for all the practical purposes of such an organization where two or more existed before. It is to lessen the number rather than continue the same, otherwise the consolidation is quite an idle formality.

It is also quite apparent that the purpose of sec. 2024—*77j*, *supra*, is to provide that such an organization shall give substantial assurance to its present and prospective patrons that it will faithfully perform the trusts it undertakes and that such assurances shall be held and safeguarded by an official of the state.

We think the substantial benefits and purposes of both the statutory provisions here in question can be best preserved, in spite of the seeming conflict arising from the broad terms used in the later of the two statutes, sec. 2024—*77rr*, by holding, as we now do, that the new corporate entity, the plaintiff in this case, succeeding as it does to the assets and assuming the liabilities of both the old entities, also succeeds to the ownership of the securities in the hands of the defendant state treasurer and is entitled to also claim the benefit of the limitation fixed by the statute as to the maximum amount of such securities so required.

It follows therefrom that the judgment of the court below must be affirmed.

By the Court.—Judgment affirmed.

IN RE JOHNSON.

February 10—March 8, 1921.

Infants: Juvenile courts: Nature: How designated in papers and records: Neglected children: Separate trials: Discretion of court: Right to jury trial.

1. The court of record which is designated by the judges in each county as the court for the exercise of juvenile jurisdiction conferred on all courts of record is not a separate juvenile court, and the venue and other papers on appeal therefrom should be stated as from the county court or other court designated and not as from the juvenile court.
2. Proceedings against children alleged to be dependent and neglected are not criminal proceedings, but are in the exercise of the police power of the state for the protection of the children.
3. The granting of separate trials to such children rests in the discretion of the trial court; and in proceedings against four children alleged to be dependent and neglected, where all the children had the same mother, but two were by a former husband, and they were all living together with their mother and her present husband so that the same circumstances would necessarily be brought in evidence as to each child, it was a proper exercise of the discretion of the trial court to refuse to grant a separate trial to each child.
4. Since sub. (1) (a), sec. 48.01, Stats. 1919, defines dependent child and neglected child as meaning the same thing, sub. (4) of the same section entitles a neglected child to a trial by jury on demand, though in terms it refers only to dependent and delinquent children.

APPEAL from a judgment of the county court of Sauk county: AUGUST C. HOPPMANN, Acting Judge. *Reversed.*

Upon the petition of W. H. Ode, resident of Sauk county, addressed to the juvenile jurisdiction of the county court of that county, and proceedings subsequently had thereon, judgment was rendered taking the custody and control of *Mabel Johnson, Rose Johnson, Elsie Raatz,* and *Annie Raatz,* alleged neglected children, from their parents, *James R. Johnson* and *Tina Johnson,* and making temporary disposition of their custody and control. From such judgment the parents and said minor children bring this appeal.

For the appellants there was a brief by *Ruggles & Evenson* of Baraboo, and oral argument by *W. G. Evenson.*

For the respondent the cause was submitted on the briefs of *Henry J. Bohn,* district attorney of Sauk county.

OWEN, J. The printed case and briefs refer to this appeal as one from the juvenile court of Sauk county. This is improper. The statutes do not create a separate juvenile court. Juvenile jurisdiction is conferred upon all courts of record and provision is made for the exercise of that jurisdiction by such court of record in each county as may be designated by the judges of such courts. As a result of careful scrutiny of the record returned to this court, we discover that in this instance this jurisdiction was exercised by the county court of Sauk county. The proceedings were had in, and the appeal is from, the county court and not from the juvenile court of Sauk county. The venue should have been so stated in the various papers pertaining to the case.

Tina Johnson is the mother of *Rose Johnson,* aged four years, and *Mabel Johnson,* aged two years, by her present husband, *James R. Johnson,* and of *Elsie Raatz,* aged fourteen years, and *Annie Raatz,* aged twelve years, by her former husband. At the time of the institution of these proceedings said children were living at the home of *Tina Johnson* and her husband, *James R. Johnson,* in Sauk county, Wisconsin. The trial court found that said *Tina* and *James R. Johnson* were improper persons to have the care, custody, and control of said minor children, and by its judgment took from them the custody and control of said children and made temporary disposition thereof. The appellants assail this finding of the court as not being sustained by the evidence. From a careful consideration of the evidence we conclude that the finding of the court in this respect is abundantly sustained. The interests of no one concerned will be promoted by extended reference thereto, and with this statement we leave the subject.

Error is also assigned because the trial court refused a separate trial for each of the infant children. This is not a criminal proceeding, as was fully pointed out in *State v. Scholl,* 167 Wis. 504, 167 N. W. 830:

"They are simply statutory proceedings by which the state, in the legitimate exercise of its police power, or, in other words, its right to preserve its own integrity and future existence, reaches out its arm in a kindly way and provides for the protection of its children from parental neglect or from vicious influences and surroundings, either by keeping watch over the child while in its natural home, or, where that seems impracticable, by placing it in an institution designed for the purpose."

The granting of separate trials rested in the discretion of the trial court, and we think that discretion was wisely exercised. While the children were progeny of different fathers, they had a common mother and were living in the same household and subject to the same influences. An inquiry into the conditions surrounding one child necessarily disclosed those surrounding the others. Even though the court might conclude that the best interests of some, but not all, of the children required their removal from the control and custody of the parents, it would not necessarily affect the disposition to be made of the others. The court could remove some of them without removing all. It seems clear that separate trials would have resulted in nothing except additional labor and expense. To be candid, it would have been a senseless proceeding, in our opinion.

The next error relied upon is more serious. A jury trial was demanded in behalf of each and all of the children. Sub. (4), sec. 48.01, Stats., provides that

"In the trial in a juvenile court of any dependent or delinquent child, any person interested may demand a jury of six persons, or the judge of his own motion may order such jury, to try the case."

Sub. (1) (a) of the same section provides:

"The words 'dependent child' and 'neglected child' shall mean any child under the age of sixteen years, who for any

reason is destitute or homeless, or abandoned or dependent upon the public for support; or has not proper parental care or guardianship; or who habitually begs or receives alms; or who is found living in any house of ill fame, or with any vicious or disreputable person, or whose home by reason of neglect, cruelty or depravity on the part of its parents, guardian or other person in whose care it may be, is an unfit place for such child; or any child under the age of eight years who is found begging, or singing or playing any musical instrument upon the street for gain or is used in aid of any person so doing."

Some confusion evidently results from the fact that the words "dependent child" and "neglected child" are by sub. (1) (a) described to mean the same thing, while in sub. (4), providing for a jury trial, the words "neglected child" are omitted. Sub. (4) would more nearly harmonize with the rest of the section if it provided for a jury trial for any "neglected," "dependent," or "delinquent" child. However, in view of the fact that the words "dependent child" and "neglected child" are defined to mean one and the same thing, the words "dependent child" used in sub. (4) of necessity include the words "neglected child." The statute, therefore, plainly provides for a jury trial in a case such as this, a right to which the children in this case were entitled upon demand therefor. Having been deprived of this valuable right, it cannot be said that they had a lawful trial, and for the error resulting from the denial of a jury trial the judgment must be reversed.

By the Court.—Judgment reversed, and cause remanded for a new trial.

ESTATE OF BOYCE.

February 10—March 8, 1921.

Wills: Legacies: When payable: Conversion of real estate into cash: Discretion of executors: Interest on legacies: Construction of will.

1. Where the will of testatrix provided for the conversion of real estate into cash within such time as it could be conveniently and advantageously done, without limiting the executors to a fixed period of time within which to make the conversion, and provided for the payment of legacies out of the proceeds of the sale of the real estate, the legacies were not due until the property had been converted, the rule that a general legacy becomes payable one year after the death of the testatrix and bears interest from that time not being applicable.
2. A will giving "one third" of the residue of the estate to each of two daughters and "one twelfth" each to a daughter-in-law and seven named grandchildren, is construed to give one third to each of the two daughters and one twenty-fourth to the daughter-in-law and each of the grandchildren, it being the apparent intention of testatrix to divide the other third among the daughter-in-law and the grandchildren.

APPEAL from a judgment of the county court of Dane county: A. G. ZIMMERMAN, Judge. *Reversed.*

The action was brought to construe certain parts of the will of Anna M. Boyce, deceased. Objections were raised to the final accounting of the administrator of the estate.

The residuary clause construed by the court was as follows:

"I give, devise, and bequeath the rest and residue of my estate as follows: To my daughter, Clara L. Hersey, one third; to my daughter, Anna L. Boyce, one third; to my daughter-in-law, *Maud W. Boyce,* one twelfth; to my granddaughter, *Jessie W. Boyce,* one twelfth; to my grandson, *Leonard F. Boyce,* one twelfth; to my grandson, *Arthur J. Boyce,* one twelfth; to my granddaughter, *Anna L. Whitney,* one twelfth; to my granddaughter, *Alice H. Boyce,* one twelfth; to my grandson, *Reuben Boyce,* one twelfth; to my granddaughter, *Martha Boyce,* one twelfth."

When the above fractions are added together they amount to four thirds.

The court held that the testatrix intended by the residuary clause to give one third of the residue to each of her two daughters mentioned in the clause, namely, Clara L. Hersey and Anna L. Boyce, and one twenty-fourth to each of her seven grandchildren and her daughter-in-law mentioned in the clause instead of the one-twelfth therein specified.

The court also allowed interest on the legacies of Clara L. Hersey, Ruth Boyce, and Anna L. Boyce from one year after the death of the testator, against the objection of the appellants. Appeal is taken from the judgment of the court construing the above mentioned paragraph and allowing interest on the bequests.

For the appellants there was a brief by *Richmond, Jackman, Wilkie & Tochaas* of Madison, and oral argument by *Harold M. Wilkie.*

For the respondents there was a brief by *Clancey & Loverud* of Stoughton, and oral argument by *E. K. Loverud.*

SIEBECKER, C. J. The court allowed interest on the bequests made to Anna L. Boyce, Clara L. Hersey, and Ruth Boyce Hersey from the expiration of a year after the death of the testatrix. The court acted upon the generally recognized legal rule that a general legacy becomes due and payable at the end of the year following testator's death, and that it bears interest from the time it is due. *Will of Barrett, ante*, p. 313, 181 N. W. 220.

It is urged that no interest should have been allowed on these legacies because the contents of the will indicate an intention by testatrix that the legacies should not be due until the property had been converted into cash by the executors as provided in the will. The will contains the following:

"I direct my executors to convert all my property into cash, or its equivalent, as soon as the same can be conveniently and advantageously done, and to dispose of the proceeds as hereinafter provided, but after a sufficient amount of property shall have been so converted to pay the specific legacies hereinafter provided for and said legacies have been

paid, if the remaining property can be divided satisfactorily to all the parties entitled thereto, as hereinafter provided," . . . or if the legatees could agree in writing to hold it in the manner specified, then "the said property may be set off to them in accordance with said agreement, in lieu of selling the same as hereinbefore directed."

In view of the nature and kind of property she owned and her financial obligations, it is clear that the testatrix intended that the legacies to her daughters and granddaughter should be paid out of the proceeds of the sale of her real estate. The provisions of the will and these surrounding circumstances are significant and decisive indications that she intended the legacies should not be due until sufficient property had been converted into cash, and such conversion was to be accomplished by the executors within such time as it could conveniently and advantageously be done. These provisions show that the executors were not to make the conversion until it was advantageous to the estate, and that they were not limited to a year or other fixed period of time. Under these circumstances the executors had a reasonable time to effect the conversion. There is no showing that the conversion of the estate was unduly postponed, and the trial court so held. It appears that the cash to pay these legacies was not received until April, 1919, and the legacies were paid the following May. Under all the provisions of the will it must be held that the will shows an intention by the testatrix that the pecuniary legacies to her daughters and her granddaughter were not to be due until the property had been converted into cash and was available to pay them, and that the county court erred in allowing interest on such legacies.

Obviously the testatrix made a mistake in paragraph VII, quoted above, in designating the fractional parts of the residue, because the total of the bequests equals four thirds. The county court held that the testatrix intended to give to each of her daughters named one third, and to divide the remaining one third equally between her daughter-in-law and the seven grandchildren designated in this paragraph. The

court in so construing this paragraph laid stress on the fact "that her two daughters were first in her affections and that she quite plainly intended to provide for them first to the extent of one third each, and then bestow the remaining one third in equal shares upon the members of the class consisting of daughter-in-law and grandchildren, who were second in importance." These considerations commend themselves to us as expressive of what the testatrix intended, as we gather it from the contents of the will and the relationship of the persons naturally entitled to her bounty. This conclusion is supported by the fact that she most naturally observed and noticed the simple division she made of the residue into three parts, one of which she gave to each of her daughters, and divided the remaining one equally between the members of the second class, namely, her daughter-in-law and grandchildren. There is a much stronger probability that she committed the error in fractions in disposing of the one third in eight equal parts to the second class than that she committed the error in dividing the residue of the estate into three equal parts. Furthermore, if appellants' claim is to be sustained, then every division made by the terms of this paragraph of the will would have to be changed; that is, the one third specified as bequests to each of her daughters would have to be changed to one fourth, and the second class, composed of daughter-in-law and seven grandchildren, would each receive one sixteenth of the residue, thus changing the designated portions to every legatee embraced in this paragraph of the will. We are persuaded that the county court correctly construed the will and that it harmonizes with the views expressed in *Will of Ehlers*, 155 Wis. 46, 143 N. W. 1050.

By the Court.—The judgment appealed from is reversed, and the case remanded to the Dane county court with directions to enter judgment in conformity with this opinion.

ESCHWEILER, J., dissents.

HINZE, Appellant, vs. KURZ, Respondent.

February 10—March 8, 1921.

Exchange of property: Temporary exchange or trade: Burden of proof: Instructions: Prejudicial error: Contracts: Meeting of minds.

1. Where plaintiff contended that he had exchanged a large bull for defendant's small bull for a season only, but possession and all indicia of ownership of the animals had changed, the burden of proving that the exchange was for a limited time rests on the plaintiff.
2. Where plaintiff claimed that the exchange was for only a season, while defendant asserted it was permanent, an instruction that unless the minds of the parties met in agreement on an exchange for the season judgment should go for defendant was correct, the contract being executed and plaintiff having the burden of proof.
3. An instruction that if plaintiff honestly believed he was making the exchange for a season only and defendant honestly believed the same the verdict should be for plaintiff, was not proper, as a party is bound not by what he honestly believes but by what he understands and agrees to; but on the whole record it is *held* that the error was not prejudicial within sec. 3072*m*, Stats.

APPEAL from a judgment of the circuit court for Shawano county: EDGAR V. WERNER, Circuit Judge. *Affirmed.*

Replevin. On February 19, 1919, the plaintiff was the owner of a large Holstein bull and the defendant was the owner of a small Holstein bull. In that month the plaintiff and defendant entered into an agreement for an exchange of the two bulls. It is the plaintiff's contention that the exchange was for the season only. It is the defendant's contention that it was a trade and that he became the owner of the large bull. The following December the plaintiff demanded a return of the large bull and offered to return the small bull. The defendant refused to make the exchange. The plaintiff began this action to recover possession of the large bull, claiming title thereto. The action was begun in justice's court. There was judgment for the plaintiff. The defendant appealed to the circuit court, the issues raised

by the pleadings were submitted to the jury, the jury found that the defendant was the owner of the large bull, fixed the value of the large bull at $135, and damages for taking and detention at six cents. The defendant had judgment accordingly, from which the plaintiff appeals.

The cause was submitted for the appellant on the brief of *Eberlein & Larson* of Shawano, and for the respondent on that of *P. J. Winter* of Shawano.

ROSENBERRY, J. Plaintiff assigns three errors:

First. That the court erroneously instructed the jury as to the burden of proof.

Second. That the court erroneously charged the jury with reference to the meeting of the minds of the parties.

Third. That the court erred in refusing instructions requested by the plaintiff.

The court instructed the jury that the burden was upon the plaintiff to establish by a preponderance of the evidence the transaction as claimed by him. The contention of plaintiff is that, because the plaintiff was admittedly the owner of the large bull prior to the time of the exchange, the burden was upon the defendant to show his title, and that therefore the burden was upon the defendant to establish the transaction as he claimed it. It is argued that *Dresser v. Lemma*, 122 Wis. 387, 100 N. W. 844, sustains this proposition. In the *Dresser Case* land had been purchased and the title thereto taken in the name of Mrs. Blanding, and the trial court held that, the deed having conveyed title to Mrs. Blanding, the burden was upon Lemma to show that either by reason of fraud the title was wrongfully conveyed to Mrs. Blanding or that a constructive trust resulted by reason of the use of Lemma's money in purchasing the land. The *Dresser Case* is authority against and not in favor of plaintiff's position. By the act of the parties the defendant was invested with all the indicia of ownership of the large bull. He had undisturbed possession of the large bull over a long period of time. In order to deprive

the defendant of his *prima facie* right to the possession of the bull it was necessary for the plaintiff to show title in himself. This, under the circumstances, he attempted to do by showing that the exchange was not, as it appeared to be, a permanent exchange, but a temporary exchange. The defendant in this case was in a position analogous to that occupied by Mrs. Blanding in the *Dresser Case* and not to the position of Lemma. We think the instruction correctly placed the burden of proof upon the plaintiff.

The second and third assignments of error involved the correctness of the instructions given by the court and whether or not requested instructions were erroneously refused. The court, in effect, instructed the jury that if they did not find that the minds of the parties met upon an agreement for an exchange for the season only, as claimed by the plaintiff, then they should find for the defendant. The plaintiff contends that there was room for a finding that the minds of the parties never met and that the instruction excludes consideration of that situation by the jury. As applied to the facts in this case, we think that contention is not sound. The transaction here was executed, not executory. Something had happened. Either the bull was in possession of the defendant under his claim that the exchange was a trade or it was in his possession under the agreement as claimed by the plaintiff that it was an exchange for the season only. No other alternative was presented. The burden being upon the plaintiff to establish his case, if he failed in so doing he could not recover, and the court correctly instructed the jury to that effect. For the same reason the questions proposed by the plaintiff relating to whether or not the minds of the parties met were correctly refused. The issue was plain and simple and properly submitted by the general verdict. In instructing the jury the court used the following language:

"That is, did the plaintiff at the time in question honestly believe that he was making an exchange of said bull in

question for the season only, and did the defendant at the time and place in question honestly believe that he was making an exchange of said bull in question for the season only? If both the plaintiff and defendant honestly believed at the time and place in question that the exchange of the bull was for the season only, and plaintiff and defendant, in fact, mutually agreed to such exchange, as claimed by the plaintiff, then the minds of the parties met."

The instruction was not happily phrased. The use of the words "honestly believed" was unfortunate. It is not what a party to a contract honestly believes, but what he understands and agrees to, that binds him. The instruction cast upon the parties a greater burden than the law required them to bear. No question of fraud or overreaching was involved. If the plaintiff or the defendant understood the facts to be as stated in the instruction, he must have honestly believed them. A subsequent instruction advised the jury that if they found that the agreement entered into between the parties was that claimed by the plaintiff, it would be their duty to find for the plaintiff. Upon the whole record it does not affirmatively appear that the error was prejudicial. Sec. 3072*m*, Stats.

By the Court.—Judgment affirmed.

HUNTINGTON, Appellant, vs. FRATERNAL RESERVE ASSOCIATION OF OSHKOSH, WISCONSIN, Respondent.

February 11—March 8, 1921.

Insurance: Fraternal associations: Change of occupation by insured: Becoming member of regular army: Death occurring from natural causes: Officers of local association: Authority to modify contract provisions.

1. Although the federal statutes providing for a military establishment of the United States distinguish between "*the* regular army" and other military organizations, an insured who joined the Wisconsin National Guard and later became a member of the army of the United States was subject to the

provisions of a clause in his insurance certificate decreasing the benefit in case the insured died while engaged in certain designated employments, one of which was "regular army."

2. Under the clause decreasing liability in case a claim accrues while the insured was engaged in a changed occupation, "whether resulting from such changed occupation or not, directly or indirectly," the beneficiary is not entitled to recover the face value of the certificate, even though the insured died from natural causes and not from any hazard peculiar to war. *Kelly v. Fidelity Mut. L. Ins. Co.* 169 Wis. 274, distinguished.

3. Under by-laws of a fraternal insurance association providing that the officers of a local council were agents of the members and not of the supreme council, and had no authority to disregard laws of the order relative to death certificates or funds, the secretary of a local council had no authority to bind the insurer by a statement to a beneficiary that the certificate of the insured, who had enlisted in the army in time of war, did not require the payment of extra assessments to keep the certificate good for its full value as long as insured was on this side of the ocean.

APPEAL from a judgment of the circuit court for Shawano county: EDGAR V. WERNER, Circuit Judge. *Affirmed.*

Action by the beneficiary of an insurance certificate, issued by the defendant, a fraternal insurance company, on the life of Harry Huntington. From a judgment in favor of the defendant plaintiff appealed.

For the appellant there was a brief signed by *A. M. Andrews*, attorney, and *Andrews & Brunner*, of counsel, all of Shawano; and the cause was argued orally by *A. M. Andrews.*

E. R. Hicks of Oshkosh, for the respondent.

OWEN, J. The insurance certificate was issued on the 6th day of April, 1915. By its terms, the certificate and the articles and by-laws of the defendant constituted the insurance contract. The certificate provided that

"If the insured, after one year of continuous insurance, shall engage in any of the following occupations, viz.: railway switchman, . . soldier in regular army in time of

war, . . . and any claim accrues while insured is so occupied, whether resulting from such changed occupation or not, directly or indirectly, there shall be paid forty per cent. only of said claim, which shall be in full satisfaction thereof, in consideration of such extra-hazardous risk having been carried for the premium named in this certificate. If the insured, while engaged in any of the foregoing classified hazardous occupations, prefers to keep his certificate in force for the full amount, he may do so, by notifying the supreme secretary in writing, and paying, while so occupied, such additional amount with each premium as required to cover the extra hazard, according to the foregoing classification."

The by-laws contain the following provisions:

"Persons engaged in the following occupations shall not be admitted to membership; and any member holding a benefit certificate and engaging in any of the said occupations shall by so doing render his or her certificate null and void, except as modified by by-laws peculiarly applicable to specific classes of certificates. Such prohibited occupations shall be as follows: Railway freight brakeman, . . . soldier in regular army in time of war, except a member who engages in service in the United States army or navy in time of war may at his option maintain his certificate in force for the full amount of the benefit payable, by paying for the 'war risk' at the additional rate of $3 per month, or $35 per year per $1,000 of insurance, which payment shall be made in advance, in addition to and at the time of payment of the regular premium payable on said certificate and shall continue throughout said service; if no such option be exercised by the member, or if the member shall fail to pay such additional war risk, the liability of this association for death or disability occurring during said period, whether resulting from said service, or not, directly or indirectly, shall be limited to forty per cent. of the amount otherwise payable under this certificate; and said service may begin at any time after said member procures the certificate in any class."

The insured, Harry Huntington, joined the Wisconsin National Guard in June, 1917, and thereafter, under army regulations, became a member of the army of the United States at the time the United States was engaged in war

with Germany and came under federal control pursuant to law, and remained in such service in the United States army until his death. During the time of said army service the insured paid no additional war risk on his said certificate but continued to pay the regular premium payable thereon. The insured died at Base Hospital, Camp Merritt, New Jersey, July 9, 1918, while a member of the army aforesaid. It is conceded that his death was due to natural causes and was not the result of extra war hazard.

Prior to the commencement of this action the defendant company tendered to the plaintiff the sum of $400 in full settlement of the claim, which tender was, after the commencement of this action, brought into and deposited in court for the benefit of plaintiff. The question here presented is whether said $400 is the extent of defendant's liability under the insurance certificate. This depends upon the proper construction of the provisions found in the certificate and by-laws of the association relating to the army service of the insured.

Appellant claims that the term "regular army" as found in the provisions referred to, means the permanent military establishment of the United States, which is maintained both in time of peace and war, or the army known in common parlance as the "standing army of the United States." The United States statutes define "regular army" as "the permanent military establishment, which is maintained both in peace and war according to law." 4 U. S. Comp. Stats. 1916, § 1716, 30 U. S. Stats. at Large, ch. 187, p. 361, sec. 3. The act of Congress passed June 3, 1916, entitled "An act for making further and more effectual provision for the national defense, and for other purposes" (39 U. S. Stats. at Large, ch. 134, p. 166), provides that the army of the United States shall consist of the regular army, the volunteer army, the officers' reserve corps, the enlisted reserve corps, the national guard while in the service of the United States, and such other land forces as are now or may hereafter be

authorized by law. It will thus be seen that the federal statutes providing for a military establishment of the United States distinguish between the regular army and other military organizations. It is conceded that the insured did not become a member of the regular army. He was a member of the national guard in the service of the United States.

It is appellant's contention that the term "regular army," as used in the certificate and by-laws, means the military organization of the United States designated in the federal statutes as the regular army, and that as insured was not a member of the regular army he was not engaged in the occupation prohibited by the contract. This contention assumes that the prohibition applies only to those who might become soldiers in the army of the United States, leaving the insured at liberty to become a soldier in the army of England, Canada, France, Germany, or any other country without affecting the liability of the company under the contract. If the prohibition were limited to soldiers in the United States army, the contention would be legitimate at least. The term "soldier in regular army" is of all-inclusive significance. It is more general than if it were "soldier in *the* regular army," which might indicate that some particular army was in mind. The term "soldier in regular army" is used in the contract as descriptive of an occupation just as the terms, railway switchman, railway switch tender, glass blower, etc., are so used, and one enters such prohibited occupation when he enlists in the regular army of any country in time of war. Furthermore, when we consider the purpose of the prohibition, we can discover no reason for a distinction between a soldier in the regular army and one in any other military organization. Both are subjected to the dangers of warfare, which is the hazard against which the company sought to protect itself. There is no reason to suppose that the company desired immunity from the hazard assumed by one of its members who should become a soldier in the regular army of the United States and not that of one

who should become a soldier in its other military establishments or in the regular army of any other country. To impute such a purpose to the company is to challenge its patriotism and good citizenship. But a proper construction of the contract, we think, discloses a special consideration extended to all soldiers in the military service of the United States. The by-laws classify as a prohibited occupation "soldier in the regular army in time of war, except a member who engages in service in the United States army or navy in time of war may at his option maintain his certificate in force for the full amount of the benefit payable, by paying for the war risk at the additional rate of $3 per month," etc. This provision extends protection to members engaging in the military service of the United States denied to those engaging in the occupation of soldier in the regular army of any other country, and indicates a purpose on the part of the company to discriminate in favor of those who enter the military service of the United States. We do not think the phrase under consideration is subject to the provincial construction contended for by appellant. As used in the certificate of insurance, it means a soldier in the regular army of any country, and the term "regular army" is not to be construed with reference to the Congressional classification of the military organizations of the United States. It may be incautious to say that it includes all enlisted men in any army of any nation in time of war, but certainly it should not be restricted to the regular army of the United States. It follows that the insured was at the time of his death engaged in an occupation which by the terms of the contract limited the liability of the company to forty per cent. of the face value of the policy.

Appellant also claims that, because the insured died from natural causes and not from any hazard peculiar to war, the beneficiary is entitled to recover the full face value of the certificate. The certificate provides that if "any claim accrues while insured is so occupied, whether resulting from

such changed occupation or not, directly or indirectly, there shall be paid forty per cent. only of said claim."

In *Kelly v. Fidelity Mut. L. Ins. Co.* 169 Wis. 274, 172 N. W. 152, this court had under consideration an insurance policy which provided that if the insured should engage in any military or naval service and die as a result, directly or indirectly, of engaging in such service, the liability of the company should be limited. It was there held that the language limiting the liability of the company for such deaths as were due only to causes peculiar to the service did not limit the liability of the company for all deaths occurring while in the military service. Under such a policy the company exempted itself from liability only where death resulted from some cause peculiar to military service. The difference between the provision of the policy there under consideration and the certificate here before us is marked. This certificate provides that there shall be paid but forty per cent. of the claim where the claim accrues while insured is occupied in one of the prohibited occupations "whether resulting from such changed occupation or not, directly or indirectly." The language of this certificate clearly limits the liability of the company where death results while the insured is engaged in the prohibited occupation, no matter whether the death results from causes peculiar to such occupation. While insurance contracts are to be construed most strongly against the company there is no room here for construction. To hold that under the language here employed the liability of the company is limited only in case death results from causes peculiar to the occupation would be a judicial declination to enforce the plain terms of the contract.

The appellant offered to prove that, upon inquiry made to the secretary of the local council on behalf of the insured, such local council secretary stated that the certificate did not require the payment of extra assessments as long as the insured was on this side of the ocean. The trial court declined to admit this evidence. The by-laws of the company

provide that the officers of the local council, as they are termed, are agents of the members and not of the supreme council. "Local councils or their officers or members shall have no authority whatever to disregard any of the laws of the order governing the benefit certificate or the several funds of the order." Clearly the secretary of the local council had no power or authority to bind the company by the statement sought to be proved and the testimony was properly rejected. *Voelkel v. Supreme Tent K. M. W.* 116 Wis. 202, 92 N. W. 1104; *Jones v. Modern Brotherhood,* 153 Wis. 223, 140 N. W. 1059; *Haycock v. Sovereign Camp W. O. W.* 162 Wis. 116, 155 N. W. 923. It is clear that the liability of the company was limited to $400, and that the judgment appealed from should be affirmed.

By the Court.—Judgment affirmed.

EMMONS, Appellant, vs. FARMINGTON MUTUAL FIRE INSURANCE COMPANY, Respondent.

February 11—March 8, 1921.

Insurance: Taking out additional insurance as forfeiture of policy: Consent of insurer: Evidence: Estoppel.

1. Evidence that the secretary of an insurance company, on receiving a letter from one of its policy-holders stating that he had taken out additional insurance, replied that he thought the amount of insurance too high but that their agent was directed to look it over, with evidence that the agent also disapproved the amount of insurance, is *held* not to show consent in writing by the secretary for the additional insurance, without which such insurance invalidated the policy sued on.
2. The fact that the defendant's secretary and representatives negotiated with plaintiff after a loss by fire and requested him to sign proofs of loss does not show that plaintiff suffered any substantial expense or trouble that would estop defendant from interposing the defense that the policy had been forfeited.

APPEAL from a judgment of the circuit court for Polk county: W. R. FOLEY, Circuit Judge. *Affirmed.*

This action was brought by plaintiff to recover on a fire insurance policy dated December 14, 1917, for loss by fire which occurred on July 4, 1918. Defendant claims that the policy is null and void pursuant to a by-law which provided that, if additional insurance is made in another company on the same property without the acknowledgment and consent in writing of the secretary, the policy is null and void. Plaintiff claims that he notified defendant of the additional insurance prior to the fire and that there was a waiver by defendant of this by-law, and also that defendant waived any forfeiture of the policy by acts constituting an estoppel.

The case was tried before the court and a jury. By a special verdict the jury found that plaintiff notified defendant's secretary in writing, more than two months before the fire, that he had obtained $1,000 additional insurance in another company. The court approved this finding, but concluded that there was no consent in writing by the secretary approving the additional insurance on the property and that the defendant was not estopped from insisting on the forfeiture of the policy occasioned by securing additional insurance without the consent of defendant's secretary. Judgment was ordered for the defendant dismissing the complaint and for costs. This is an appeal from such judgment.

For the appellant there was a brief by *McNally & Doar* and *James E. Hughes,* all of New Richmond, and oral argument by *W. T. Doar.*

For the respondent there was a brief by *Kennedy & Yates* of Amery, and oral argument by *W. T. Kennedy.*

SIEBECKER, C. J. The policy in question contains the following condition: "Section 4. If any additional insurance is made in any other company on the same property insured in this company without acknowledgment or consent in writing by the secretary of this company, this policy shall be null and void." The plaintiff obtained $1,000 insurance in another company on February 14, 1918, while the policy sued

on was in force. The jury found that plaintiff wrote to the company's secretary informing him of this additional insurance on April 21, 1918. On April 23d, following, the company's secretary wrote plaintiff acknowledging receipt of plaintiff's letter and stating further:

"In regard to the insurance on your barn, 24 x 36, I think $1,600 would be too high for a barn of that size. I notified Mr. Kirsch to look it over and he can tell you just what we could do on the insurance. I know your place, but cannot remember about the barn. Mr. Kirsch is our agent."

What took place between plaintiff and Mr. Kirsch about additional insurance after the letter of the secretary to plaintiff on April 23d is not found by the jury, but the court in its opinion states in substance that plaintiff was informed by Kirsch, either then or sometime theretofore, that one or two hundred dollars additional insurance was all the company would write on the barn. Since the court dismissed plaintiff's complaint, it necessarily follows that the court came to the conclusion that plaintiff was informed by Kirsch that he disapproved the additional $1,000 insurance plaintiff had obtained in another company. We think it is sufficiently established that there was no consent in writing by the secretary of the company for this $1,000 additional insurance and plaintiff's policy in defendant's company became null and void. Under the facts and circumstances it cannot be said that the company's representatives, through silence or otherwise, did anything to lead plaintiff into the belief that the additional insurance stood approved, for it appears that both the secretary and Kirsch informed plaintiff that they could not approve the additional insurance, and that the secretary's letter of April 23d is not a consent in writing to such additional insurance.

It is urged that if there was a forfeiture of the policy the action of the company's representatives in adjusting the loss and negotiating with plaintiff at his farm after the fire constitutes an estoppel and prevents the company from insisting

on a forfeiture of the policy. When the committee and defendant's secretary came to plaintiff's home to ascertain the amount of his loss, very little, if anything, was required of plaintiff. As the trial court states:

"In this case about all defendant's committee asked the plaintiff to do was to sign the so-called proof of loss. . . . It was written by the secretary and all the plaintiff had to do was sign it, although it was undoubtedly written on information obtained from plaintiff in answer to questions propounded to him. It does not seem to me that there is a showing of any substantial expense or trouble caused the plaintiff by defendant in anything that took place after the fire, and that defendant is not estopped to make the defense interposed in this action."

It is considered that these conclusions of the trial court are correct and that the action was properly dismissed.

By the Court.—The judgment appealed from is affirmed.

JENKINS, Respondent, vs. JENKINS, Appellant.

February 11—March 8, 1921.

Divorce: Custody of children: Discretion of court: Division of estate.

1. In determining the custody of minor children in a divorce action, the result reached should subserve the best interests of the children, and the conclusion of the trial court should not be disturbed unless clearly wrong.
2. In an action of divorce growing out of a situation of estrangement for which no tangible cause can be assigned, but which is actual, the wife testifying that she cannot live with her husband, having no love for him, it was error for the trial court to take the youngest son of three, aged eight, five, and three years respectively, from the custody of the defendant wife, both parties being morally fit to have the custody of the children and both being able to maintain homes for them.
3. Where the support of two of the three minor sons was charged to the plaintiff husband and the support of the youngest son was cast on the defendant wife, title to the house of the husband worth $1,602, subject to a mortgage of $800, and to

furniture worth $1,400, was properly confirmed in him, the wife's earning power almost equaling his, she having her home with her parents.

APPEAL from a judgment of the superior court of Douglas county: SOLON L. PERRIN, Judge. *Modified and affirmed.*

Action for divorce. Plaintiff and defendant were married November 25, 1911, at Duluth, Minnesota, and were divorced by the judgment herein December 21, 1920. At the time of the trial plaintiff was thirty-six years of age and defendant twenty-six. Three children were born to them: William S., aged eight years; Allen, aged five; and Eugene, aged three years. Defendant without cause left plaintiff about the 11th day of March, 1918, taking the youngest son with her. Since then up to the time of the trial he has lived with her and the other two children remained with their father. The court granted the custody of all the children to the father, permitting defendant to visit them at reasonable times. The plaintiff earns about $150 per month and the defendant had a salary of $128 per month at the time of the trial. She is living with her parents in Duluth and he is living in Superior. Defendant appealed from the judgment, alleging that the court erred in granting the custody of the boy Eugene to plaintiff instead of to herself, and that it erred in the division of property that was made and in its refusal to grant her suit money.

For the appellant there was a brief by *Luse, Powell & Luse* of Superior, and oral argument by *C. Z. Luse.*

For the respondent there was a brief by *Grace, Fridley & Crawford* of Superior, and oral argument by *W. P. Crawford.*

VINJE, J. The trial court found that both the plaintiff and the defendant were morally fit and financially able to care for one or all of the children, and it reached the conclusion that it was for the best interests of the children that they should be brought up as one family and that the plaintiff

should have the custody of all. It must be admitted that the trial court proceeded upon the right conception of the law, namely, that the result reached should subserve the best interests of the minor children. *Welch v. Welch,* 33 Wis. 534; *Johnston v. Johnston,* 89 Wis. 416, 62 N. W. 181; *Markwell v. Perceles,* 95 Wis. 406, 69 N. W. 798. It is also borne in mind that the conclusion of the trial court should not be disturbed unless clearly wrong. *Welch v. Welch,* 33 Wis. 534. In view of these well established principles of law, should the court modify the decree as to the custody of the children? A correct answer to the question requires a somewhat fuller statement of the cause for the decree of divorce. Defendant when married was only seventeen years old and plaintiff was then twenty-seven years of age. They lived for a while with defendant's father and mother, but that did not prove satisfactory and the young couple established a home of their own. It is apparent that "her folks and his folks" did not harmonize, and the same is true as to plaintiff and defendant's parents. Much of the discord between the parties was aggravated if not induced by her parents. On the other hand there seems to be some ground for their conduct. The plaintiff at times drank some and enjoyed dances and parties that his wife did not relish, though she says he never abused her when he drank and that his lapses from sobriety were neither frequent nor excessive. They both testify to the fact that she frequently entreated him to be better, though it is not very clear just in what his failing consisted. He says he promised to be better and she says that for periods he was better. Her parents were Presbyterians and she was a Methodist. It does not appear that he belonged to any church. In March, 1918, she left him without cause, as the trial court found, and steadily refused to return to live with him though he urged her to do so and was able and willing to provide a suitable home for her. She had left him temporarily several times before but had gone back. She says her love for her husband is entirely

gone and she cannot live with him again. Such in outline are the salient facts out of which the divorce grew. We sense a lack of knowledge of important facts that must have materially influenced the parties in their relations to each other, but we concur in the trial court's view that both are morally fit to have the custody of the children.

For about two years she had the care and custody of the youngest child, Eugene, living with him at the home of her parents in Duluth, which the evidence shows is a very moral and suitable home. He has had a housekeeper and kept house in Superior and has had the two older boys with him. The evidence shows that he may have to resort to one of his two married sisters to aid him in caring for the boys he has had. They are willing and fit to do so. The situation is a perplexing one, rendered so by the unfortunate estrangement between the husband and wife. In view of the situation thus briefly outlined we reach the conclusion that the trial court erred in taking the youngest child from the custody of the mother. For a boy of such tender years nothing can be an adequate substitute for mother love—for that constant ministration required during the period of nurture that only a mother can give because in her alone is duty swallowed up in desire; in her alone is service expressed in terms of love. She alone has the patience and sympathy required to mold and soothe the infant mind in its adjustment to its environment. The difference between fatherhood and motherhood in this respect is fundamental and the law should recognize it unless offset by undesirable traits in the mother. Here we have none so far as mother love is concerned.

The plaintiff owns a house worth about $1,600 on which there is a mortgage for $800. The parties also had about $1,400 worth of furniture acquired by plaintiff before his marriage. This was sold when defendant left him. The title to this property was by the court confirmed in the plaintiff. It seems defendant retained her piano and some per-

sonal belongings. She asks for a reversal of the judgment as to the division of the property and for a share thereof. It is true that even in a case where the wife is at fault this court has permitted her to share in the property. *Roder v. Roder,* 168 Wis. 283, 169 N. W. 307. In this case, however, we think the judgment as to division of property should stand because the support of two of the children is cast upon him while under our decision she has only one to support. Her earning power almost equals his, and she has a home with her parents which even if liberally paid for can be maintained at a much less expense than he can maintain a house. Her unjustified conduct has cast added expense upon him and she should bear a reasonable part of it by foregoing a share of the property which it seems he had before she married him.

By the Court.—The judgment is modified so as to award the custody of the son Eugene to the defendant and the custody of the other two children to the plaintiff, with reasonable provisions permitting either spouse to visit the child or children in the custody of the other, and as so modified is affirmed, with costs in this court to the defendant.

STATE EX REL. GILLEN, Appellant, vs. BRAMAN, Respondent.

February 11—March 8, 1921.

Municipal corporations: Special charter of Milwaukee: General statute not contravening: Failure of common council to confirm appointees: Successive appointments: Eligibility of officers.

1. Sec. 925—38*b*, Stats. (ch. 493, Laws 1907), declaring that appointments to public office by the mayor in all cities shall be subject to confirmation by the common council, and that a rejected appointee shall be ineligible to appointment to the same office for one year thereafter, applies to the city of Milwaukee, although it has a special charter providing in sec. 14, ch. XX, that no general law contravening its provisions shall be considered as amending or repealing the charter except such purpose be expressly declared, the statute not contra-

vening any of the provisions of the charter. *Superior v. Industrial Comm.* 160 Wis. 541, followed.

2. Where on April 20, 1920, the mayor of the city of Milwaukee appointed the plaintiff to the office of commissioner of public works, which appointment was rejected by the common council on May 3, 1920, the action of the mayor was an appointment under sec. 925—38*b*, Stats., although on April 20, 1920, plaintiff was ineligible to office because within one year previous to that date he had been appointed to the same office by the mayor and had not been confirmed by the council. By the appointment of April 20, 1920, and subsequent rejection plaintiff became ineligible for office under an appointment made July 26, 1920, and confirmed August 2, 1920.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

Mandamus. On September 17, 1917, one Fred G. Simmons was commissioner of public works of the city of Milwaukee and *Percy Braman,* the respondent, was deputy commissioner of public works. On that day Fred G. Simmons resigned his office, and thereafter the respondent, as deputy commissioner, performed the duties of the office of commissioner of public works. On April 15, 1918, the mayor of the city of Milwaukee appointed the plaintiff, *William H. Gillen,* to the office of commissioner of public works, which appointment was rejected by the common council on May 6, 1918. The history of the mayor's action and the action of the common council is summarized in the following statement:

Mayor's Action.	*Action of Common Council.*
First appointment, April 18, 1916.	Rejected April 24, 1916.
Second appointment, April 15, 1918.	Rejected May 6, 1918.
Third appointment, June 30, 1919.	Rejected July 21, 1919.
Fourth appointment, April 20, 1920.	Rejected May 3, 1920.
Fifth appointment, June 1, 1920.	Confirmed June 28, 1920.
Sixth appointment, July 26, 1920.	Confirmed August 2, 1920.

After the last appointment was confirmed by the council on August 2, 1920, the plaintiff attempted to take possession of and exercise the duties of the office of commissioner of public works. The defendant refused to allow the plaintiff to do so, excluded the plaintiff from the office, and continued to hold the office and to perform its duties. Thereupon the plaintiff applied to the circuit court for Milwaukee county for an alternative writ of *mandamus* commanding the respondent to turn over the office of commissioner of public works to the plaintiff or show cause why he should not do so. The defendant filed a return to the alternative writ, to which the plaintiff demurred. The court overruled the demurrer and quashed the appellant's writ, and from the judgment entered the plaintiff appeals.

For the appellant there was a brief by *Rix & Barney* and *David A. Sondel,* all of Milwaukee, and oral argument by *Mr. Sondel* and *Mr. John M. Barney.*

E. L. McIntyre of Milwaukee, for the respondent.

ROSENBERRY, J. Two questions are presented:

First. Does "Sec. 925—38*b*. The appointments to public office by the mayor of all cities shall be subject to confirmation by the common council, unless otherwise provided by law. An appointee to any office rejected by the common council shall be ineligible for appointment to the same office for one year thereafter," apply to the office of commissioner of public works for the city of Milwaukee?

Second. If sec. 925—38*b* is applicable, did the action of the mayor in sending plaintiff's name to the common council April 20, 1920, at a time when the plaintiff was ineligible. amount in law to an appointment under the provisions of sec. 925—38*b*?

Sec. 925—38*b* was enacted by the legislature of 1907 as a part of ch. 493 of the Laws of 1907. There was also created by said ch. 493 sec. 925—171*a*, which provided that "the park commissioners of all cities shall, under the direc-

tion of the common council," etc. In *Superior v. Industrial Comm.* 160 Wis. 541, 152 N. W. 151, it was held that ch. 493 of the Laws of 1907 was an act of general nature as to the cities of the state, and sec. 925—171*a*, therefore, applied to the city of Superior although it operated under a special charter. The plaintiff here urges very strongly that sec. 925—38*b* does not apply to the city of Milwaukee, which operates under a special charter.

The main contention of the plaintiff upon this proposition is that by sec. 14, ch. XX, of the charter of the city of Milwaukee it is provided:

"No general law of this state, contravening the provisions of this act, shall be considered as repealing, amending, or modifying the same, except such purpose be expressly set forth in such law."

Sec. 925—38*b* does not contravene any of the provisions of the charter of the city of Milwaukee. It is a general statute applicable by its terms to all the cities of the state and not in any sense in conflict with the charter of the city of Milwaukee. The decision of this court in *Superior v. Industrial Comm.* 160 Wis. 541, 152 N. W. 151, is decisive upon this branch of this case.

Upon the second proposition little can be said. It is the contention of the plaintiff that the naming by the mayor of a person ineligible to the office is not an appointment within the meaning of sec. 925—38*b*, the act being wholly void. If we were to so construe the statute, we should be obliged, in effect at least, to insert the word "eligible" before the word "appointee." We do not feel that we are warranted in adopting such a construction. It was the apparent purpose of the legislation to prevent occurrences of the kind involved in this action. No limiting words were inserted before the word "appointee." If a person, though ineligible, had in fact been appointed and the appointment confirmed, and he had, without objection, entered upon the duties of his office, there can be no doubt that he would have been at least

a *de facto* officer. If so, he must have been appointed and therefore must have been an appointee. We do not think that the question of whether or not a person is an appointee turns upon the question of his eligibility, but rather upon the fact of his appointment. From this it follows that the plaintiff was not eligible to appointment at the time his appointment was confirmed by the common council August 2, 1920.

By the Court.—Judgment affirmed.

KLOSKY, Respondent, vs. PAYNE, as Agent, and another, Appellants.

January 11—April 5, 1921.

Railroads: Passenger stations: Customary construction: Negligence.

1. A railroad passenger station platform is not obviously unsafe because it was on a level with the rails, or because there was a space of only four feet and eight inches between the overhang of an engine passing on the track and a stairway, where the only evidence on the point was to the effect that the tracks and platform were constructed in the ordinary and usual manner.
2. One who uses a customary appliance which is in good repair and not obviously dangerous, in a usual and customary manner, is free from negligence.

APPEAL from a judgment of the circuit court for Milwaukee county: WALTER SCHINZ, Circuit Judge. *Reversed.*

Action to recover damages for personal injuries sustained by plaintiff on July 16, 1918, as a result of being struck by one of defendants' trains on the platform of the passenger depot at Allis. The platform is raised above the street level and is reached by a stairway that has a concrete hood or covering, the west wall of which is seven feet and four inches from the east rail of the south-bound track. The north-bound track is on the east side of the platform and nineteen feet and four inches from the south-bound track.

The platform covers the whole space between the two tracks and is on a level with them. Plaintiff, a police officer, and well acquainted with the premises, was called up to look after some children on the platform at about train time. He came up the stairway facing the north, but on reaching the platform he turned around and faced south and was struck by a south-bound train. Whether he was struck by the engine because he suddenly moved nearer the track as it approached, or because he stood near enough to the track all the time—about two minutes,—is in dispute.

The jury found that the whistle was not blown; that the bell was rung; that plaintiff was free from contributory negligence; that defendants' platform was not as free from danger to the public as the nature thereof reasonably permitted; that such defect therein was the proximate cause of plaintiff's injury; and damages in the sum of $5,500. The court amended the verdict by finding that the whistle of the engine was blown as it approached the platform. From a judgment thereon as amended entered in favor of the plaintiff the defendants appealed.

H. J. Killilea of Milwaukee, for the appellants.

For the respondent there was a brief by *Otjen & Otjen* of Milwaukee, and oral argument by *H. H. Otjen.*

The following opinion was filed February 8, 1921:

VINJE, J. The only finding the court deems it necessary to consider is the one declaring the platform unsafe. It is claimed by plaintiff that it was unsafe in at least two respects: first, because it was planked on a level with the rails, thus inducing the belief in passengers that it was safe to stand on it anywhere; that it should have been elevated above the track and ended at least two feet eight inches from the rails, thus preventing passengers from standing within reach of the overhang, which on the ordinary engine is two feet eight inches; and second, because a space only seven feet four inches was left between the covering of the stair-

way and the rail of the track, leaving a safe space of only four feet and eight inches between the covering and the overhang. No evidence, expert or otherwise, was introduced by plaintiff to show that the platform as constructed was unsafe or that it was not the usual mode of construction of platforms under similar conditions or where there is more than one passing track. On the other hand, the defendants introduced evidence to the effect that the tracks and platform were constructed and put in place in the manner ordinarily and usually used by the *Chicago, Milwaukee & St. Paul Railway Company* in this state at that time and that at the Chicago & Northwestern Railway Company's lake-shore depot at Milwaukee the platform and tracks were similarly constructed. We therefore face a situation similar to that in the case of *Jensen v. Wis. Cent. R. Co.* 145 Wis. 326, 128 N. W. 982, where the jury found that the location of a switch with reference to a cattle-guard was unsafe, in the absence of any evidence to sustain the finding and against evidence that it was the usual mode of locating such switches. It was there held that, except as to a railroad construction obviously dangerous, a jury could not convict a railroad company of maintaining an unsafe place in the absence of evidence to sustain it, and especially so when the evidence shows that the mode of construction is a customary one. In *Merton v. Mich. Cent. R. Co.* 150 Wis. 540, 543, 137 N. W. 767, the principle was thus stated: One "who uses a customary appliance which is in good repair and not obviously dangerous, in a usual and customary manner, is free from negligence."

It cannot be said that the platform in question is obviously dangerous. Indeed, the opinions of careful, prudent men might well differ as to whether or not it is more dangerous than the platform raised above the tracks suggested by the plaintiff. That it is more convenient where there are two or more passing tracks is obvious.

Neither can a clear safe place four feet eight inches wide—the distance between the covering of the stairway and

the overhang—be said to be obviously dangerous. A person can step back a safe distance from the overhang space and yet have plenty of room in which to stand.

It is held that the case comes within the principles announced in the two cases mentioned, and it is not necessary to consider the question of plaintiff's alleged contributory negligence.

By the Court.—Judgment reversed, and cause remanded with directions to dismiss the complaint upon the merits.

A motion for a rehearing was denied, with $25 costs, on April 5, 1921.

GOLDBERG, by guardian *ad litem,* Respondent, vs. BERKOWITZ, Appellant.

GOLDBERG, Respondent, vs. SAME, Appellant.

January 13—April 5, 1921.

Negligence: Contributory negligence of child: Coasting on city streets: Collision with automobile.

1. The question whether or not a boy nine and a half years old exercised due care under all the facts and circumstances must be determined in the light of the care which is ordinarily exercised by children of the same age, capacity, discretion, knowledge, and experience under the same or similar circumstances.
2. In determining such question due consideration must be given to the power and influence of childish instincts; for while a child may have the knowledge of an adult respecting dangerous acts he may not have the prudence, discretion, or thoughtfulness to avoid the hazards and risks to which they expose him.
3. A boy nine and a half years of age, possessing the capacity and discretion of boys of his age generally, was guilty of contributory negligence as a matter of law in colliding with defendant's automobile at a street intersection, where the evidence disclosed he was coasting down a hill face downward on his sled, without observing whether or not his course was clear, he having testified that he could guide his sled to either side of his course.

APPEALS from judgments of the circuit court for Milwaukee county: JOHN J. GREGORY and WALTER SCHINZ, Circuit Judges. *Reversed.*

These two appeals arise out of the same cause of action.

The first case is an appeal from a judgment of the circuit court for Milwaukee county, JOHN J. GREGORY, judge presiding, affirming the judgment of the civil court of Milwaukee county.

The action was brought to recover damages for an injury to plaintiff resulting from a collision between a coaster sled upon which the plaintiff was riding and an automobile of defendant operated by his employee.

Plaintiff alleges that the accident occurred at a point where Ninth street intersects Sherman street in the city of Milwaukee; that the place in question is in the vicinity of school grounds and what is known as Lapham Park, which is a park provided by the city as a playground for children; that during the winter months it was usual and customary for the children of the neighborhood to coast down the hill of this park and onto Ninth street; that defendant and his servants knew that it was the custom of the children of the neighborhood to play in the manner above described; that defendant's employee ran into and struck plaintiff, causing the injuries alleged; that at the time of the collision defendant's employee was driving at an excessive rate of speed without maintaining a proper lookout and without giving any warning of his approach by the sounding of a horn or otherwise. Damages are demanded in the sum of $2,000.

The answer of defendant denies the allegations of plaintiff's complaint.

By a special verdict the jury found (1) that the driver of defendant's automobile was guilty of a want of ordinary care in the operation of his truck at the time of and immediately before the accident; (2) that such want of ordinary care was the proximate cause of the plaintiff's injuries; (3) that the plaintiff was not guilty of any want of ordinary

care which proximately caused his injuries. Damages were fixed in the sum of $2,000. Judgment was ordered on the verdict. Upon appeal to the circuit court the judgment was affirmed, from which judgment an appeal is taken to this court.

The second action is brought by the father, and is substantially the same as the first with the exception that one additional witness, David Markus, testifies that the defendant's employee was driving at the rate of sixteen or seventeen miles an hour and that there was no reduction of the speed of the car until the boy was hit. Trial of the case was had before the court and a jury in the civil court of Milwaukee county. By a special verdict the jury found that the driver of defendant's car was guilty of a want of ordinary care; that this was the cause of plaintiff's injury; that plaintiff was not guilty of contributory negligence. Damages were fixed in the sum of $1,500. Judgment was rendered on the verdict. This judgment was confirmed by the circuit court for Milwaukee county, WALTER SCHINZ, judge presiding.

Appeal is taken to this court.

Dale C. Shockley, attorney, and *L. A. Schweichler*, of counsel, both of Milwaukee, for the appellant.

For the respondents the cause was submitted on the briefs of *Michael Levin* of Milwaukee.

The following opinion was filed February 8, 1921:

SIEBECKER, C. J. The appellant insists that the civil and circuit courts erred in holding that the issue of *Louis Goldberg's* contributory negligence is properly for determination by the jury, and urges in this court that the evidence shows as matter of law that he was guilty of contributory negligence.

At the time of the accident this boy was nine and one-half years of age. Whether or not the boy exercised due care under all the facts and circumstances disclosed by the evidence

must be determined in the light of the care which is ordinarily exercised by children of the same age, capacity, discretion, knowledge, and experience under the same or similar circumstances. *Ryan v. La Crosse City R. Co.* 108 Wis. 122, 83 N. W. 770; *Wills v. Ashland L., P. & S. R. Co.* 108 Wis. 255, 84 N. W. 998; *Ballard v. Bellevue A. Co.* 162 Wis. 105, 155 N. W. 914; *Kollentz v. C. & N. W. R. Co.* 170 Wis. 454, 175 N. W. 929.

The precedents are in general to the effect that in determining whether or not a child exerised the care that one of its age, capacity, knowledge, and experience exercises under similar circumstances, due consideration must be given to the power and influence of childish instincts; for while a child may have the knowledge of an adult respecting dangerous acts, he may not have the prudence, discretion, or thoughtfulness to avoid the hazards and risks to which they expose him. If the facts disclosed by the evidence clearly establish what care was exercised by the child and that he possessed the capacity, knowledge, discretion, and experience of the generality of children of his age, it then became a proper question for the court to inquire as a matter of law whether or not he was guilty of contributory negligence on the occasion in question. The evidence clearly shows that the plaintiff *Louis Goldberg* was an intelligent boy who possessed the capacity and discretion of boys of his age generally and that he had the knowledge and experience in the affairs of life that boys of his age commonly possess. The evidence shows affirmatively that he had attended the public schools from about his fourth year and that he was familiar with the dangers and hazards in streets and of colliding with automobiles while coasting on the streets. On this subject he testified that he knew it was dangerous because automobiles drive past; that his folks told him many times to be careful in going across streets. On the point of what he did before and while coasting he says that when he started to

coast he borrowed a sled from a companion and started up the hill; that two of his playmates, standing at the foot of the hill near the street, had told him no automobile was in sight; that he proceeded to his starting place near the top of the hill; that in his position on the sled he lay on his stomach, face downward, with his hands placed so that he could guide the sled; that as he proceeded he did not look up to observe whether or not his course was clear but held his head down between the front of the sled runners; that he did not see or hear defendant's automobile until they met in the street near the curb opposite the side where he entered onto the street. It appears that the course was icy and that plaintiff was going "pretty fast." The collision between the sled and automobile occurred near the curb of the street opposite the side where plaintiff entered the street from the hill down which he coasted, thus showing plaintiff had nearly crossed the traveled part of the street before the collision occurred. It also appears that the automobile stopped within a few feet from the point of collision and that the driver had turned the car to the right onto the street bank. The evidence and surrounding facts and circumstances show that the highest speed of the automobile was not to exceed sixteen miles per hour. It thus appears that plaintiff voluntarily adopted a very dangerous method of crossing this public street, that he exercised no precaution after starting on his course down the hill to ascertain whether the street was clear of vehicles of any kind, and that he ran quite recklessly onto the street without even looking up to see whether any vehicle was approaching. He states that he could have guided his sled to either side of his course and could have "shifted" it to avoid obstacles, and that he did not do so. We are forced to the conclusion that plaintiff's conduct shows that he was actively negligent, in view of his age, capacity, discretion, knowledge, and experience, giving due consideration to the power and influence of boyish instinct while engaged in this sport and to

the dangers and hazards to which he was exposed, and that such negligence proximately contributed to produce the injuries complained of. The necessary result is that the court erred in refusing to award judgment in both of these cases dismissing the plaintiffs' complaints.

By the Court.—The judgments appealed from are reversed, and the causes remanded to the circuit court with direction to award judgment in each case dismissing plaintiff's complaint.

A motion for a rehearing was denied, with $25 costs, on April 5, 1921.

STATE OF WISCONSIN, Plaintiff in error, vs. B——, Defendant in error.

January 15—April 5, 1921.

Criminal law: When jeopardy attaches: Waiver by plea: Withdrawal of count from jury: Implied acquittal: Waiver of jeopardy by reversal on review by accused: Review by state: Extent of waiver: Affirmance on defendant's writ: Information charging rape: Adultery as a lesser offense.

1. When a person has been placed on trial on a valid indictment or information before a court of competent jurisdiction, has been arraigned and has pleaded, and a jury has been impaneled and sworn, the general rule is that jeopardy has attached.
2. Under sec. 4645*a*, Stats. (providing that special pleas in bar may be entertained in the discretion of the court on the application of a defendant after the jury is impaneled, but that the application shall constitute a waiver of any jeopardy that has attached), a defendant, who after a jury was impaneled renewed a plea in bar, and after the court had required the state to answer or demur to the plea and overruled defendant's demand that the case be tried by the court introduced evidence in support of the plea and a verdict was returned sustaining it, waived any jeopardy that had theretofore attached.
3. Under sec. 4724*a*, authorizing the state to bring a writ of error from any order or judgment sustaining a special plea in bar

made or rendered before jeopardy attached, the state may bring a writ of error though jeopardy had attached, where it was waived by defendant under sec. 4645*a*, as sec. 4645*a* (Laws 1911, ch. 187) and sec. 4724*a*, Stats., as amended by said ch. 187, relate to the same subject matter and should be read and construed together.

4. Where defendant was charged with rape and adultery and the court instructed the jury that he could not be found guilty of both offenses, in effect withdrawing the charge of adultery if he was found guilty of rape, he was in jeopardy as to the charge of adultery and could not be again tried therefor unless he had waived such jeopardy.
5. By applying for a new trial and by suing out a writ of error pursuant to which the judgment was reversed, defendant waived any jeopardy which might theretofore have attached as to the crime of which he was convicted and lesser included offenses.
6. When a defendant has been once tried and a judgment of acquittal or conviction has been rendered, he has an absolute constitutional right to stand on the judgment as a bar to further prosecution for the same offense; but when he seeks to obtain a new trial, the extent of his waiver of the jeopardy theretofore attaching is a matter for legislative regulation not within the protection of the constitutional guaranty.
7. Under sec. 21, art. I, Const., providing that writs of error shall issue in criminal cases as a matter of course, sec. 4719, Stats., authorizing new trials, and sec. 4724*a*, providing that where defendant prosecutes a writ of error the state may take a writ of error from the order or judgment of conviction upon a record containing rulings adverse to the state, where defendant brings a writ of error he waives the jeopardy which has theretofore attached so far as is necessary to give the state an effective review of other questions arising upon the same trial.
8. If on the review sought by the accused the trial court's determination is affirmed, there can be no further inquiry, as the judgment of conviction, under the doctrine of implied acquittal, prevents a retrial as to other offenses charged.
9. Under sec. 4724*a*, Stats., as amended by ch. 187, Laws 1911, where defendant was charged with adultery and rape and convicted of rape and sued out a writ of error on which the judgment was reversed, and the state sued out no writ of error, defendant did not waive the jeopardy as to the charge of adultery and could not be retried for that offense, adultery being a distinct offense and not a lesser offense included in that of rape.

ERROR to review a judgment of the circuit court for Eau Claire county: JAMES WICKHAM, Circuit Judge. *Affirmed.*

Former jeopardy. Defendant was tried in the circuit court for Dunn county upon an information containing three counts; one charging the defendant with having, on the 3d day of September, 1916, committed the crime of rape upon one Edna Mann; the second count charged him with having committed the crime of adultery with one Edna Mann. There was a third count for rape, which was abandoned upon the trial and will not be again referred to. All offenses charged were predicated upon the same circumstances and the same act. Upon the trial the jury returned a verdict finding the defendant guilty of rape, and under the instructions of the trial court the jury did not consider the charge of adultery. Judgment of conviction was entered upon the verdict. The defendant sued out a writ of error from this court, and, upon hearing, the judgment of the circuit court was reversed and a new trial ordered. In reversing the judgment of the trial court this court said:

"Applying these principles to the testimony in the present case, we are obliged to say, after a diligent examination of the evidence, that in our judgment the crime of rape is not proven on account of the grave doubt that remains as to whether the prosecutrix made that resistance which the law requires in view of all the surrounding circumstances. Justices SIEBECKER and ESCHWEILER are of opinion that the question whether intercourse was had at all is so gravely in doubt that the judgment should be reversed on that ground also, but the court does not so hold." *B—— v. State*, 166 Wis. 525, 166 N. W. 32."

The record was duly remitted to the circuit court for Dunn county. Thereafter the venue of the action was changed to Eau Claire county and the case came on for trial at Eau Claire on the 18th day of March, 1918. The defendant appeared in person and by counsel. When the case was called the district attorney announced that he wished to

have time to procure the presence of Mr. Baker, assistant attorney general. The court thereupon said that he thought it better to call a jury and not wait until the next day. Thereupon the jury was drawn. After the jury had been impaneled, but before it was sworn, counsel for the defendant announced that they wished to renew the plea in bar. The district attorney having stated that there was no substantial change in the evidence to be adduced in reference to the offense of rape charged in the first count in the indictment, the trial court announced that as to that count the plea of the defendant was sustained. As to the second count, relating to the charge of adultery, the court announced that the plea was overruled, the court reserving the right to consider it further if he should be further advised. The jury was then sworn to try the issues in the case and thereupon a recess was taken until 9 o'clock the next day. At the opening of court on the next morning the court announced that he had further examined the questions of law that were argued and had examined the record and that there was nothing in the record to indicate that the defendant had pleaded to the information. Finally it was made to appear that the defendant had pleaded to the information. The court then announced that in his opinion the proper practice had not been followed with reference to the plea in bar, and that in his opinion the state should either demur to or answer the plea in bar, and that any issue of fact raised should be tried by the jury. After some colloquy between the court and counsel the state entered a general denial to the matter set forth in the plea in bar. The defendant by his counsel then objected to the sufficiency of the answer to raise an issue, and further that the answer of the state was not under oath. The court held the answer sufficient and announced that the sufficiency of the plea would be determined as a question of fact, there being no challenge by the state to the sufficiency in law of the plea in bar. The court then

announced that the ruling made upon the plea as to the first count, relating to rape, would stand and said:

"I presume that the proper practice or better practice is to first try that issue [the issue raised by the plea in bar] before taking up the question of the guilt or innocence of the defendant on that charge."

Counsel for the defendant then suggested that it should be tried before the court. The court ruled that it should be tried before the jury. The defendant then introduced evidence in support of the plea in bar to the second count, relating to the charge of adultery. After the evidence had been received there were arguments by counsel. The facts being undisputed, the trial court held that the defendant might have been convicted upon the first trial of both offenses, but not having been convicted of adultery upon the first trial he was, in effect, acquitted of that charge, and for reasons set out at length directed the jury to return a verdict sustaining the plea in bar upon the ground that the defendant had been once acquitted of the charge of adultery. Upon the verdict being received the defendant moved that he be discharged. The motion was granted, the defendant was discharged, and the state has sued out this writ of error to review the proceedings had.

For the plaintiff in error there were briefs by the *Attorney General* and *J. F. Baker* and *J. E. Messerschmidt,* assistant attorneys general, and oral argument by *Mr. Baker* and *Mr. Messerschmidt.*

For the defendant in error there were briefs by *Martin, Martin & Martin* of Green Bay, and oral argument by *P. H. Martin.*

The cause was originally argued on June 5, 1920. On October 22, 1920, a re-argument was ordered upon the following question:

"Does a motion by the defendant for a new trial upon a verdict finding the defendant guilty upon one count in an

information waive any jeopardy as to other offenses included therein, or as to offenses charged in other counts growing out of the same acts or circumstances, where consideration of included offenses or offenses charged in other counts is withdrawn from the jury or not in fact passed upon by the jury?"

ROSENBERRY, J. It is the contention of the defendant here that he cannot be further proceeded against because, first, he was upon the first trial acquitted of the charge of adultery; second, that upon the second trial the jury was sworn, and charged with his deliverance, and he was therefore placed in jeopardy and cannot again be placed in jeopardy for the same offense; and third, that the state is not entitled to sue out a writ of error to review the proceedings of the trial court because no statutory authority therefor exists.

We shall consider the second and third objections first, for if upon the second trial jeopardy attached the state has no right of appeal and the appeal should therefore be dismissed. Sec. 4724*a*, Stats., provides:

"A writ of error may be taken by and on behalf of the state in criminal cases:

"(1) . . .

"(2) From an order or judgment sustaining a plea in abatement or a special plea in bar made or rendered, before jeopardy has attached.

"(3) From any final order or judgment, adverse to the state, made or rendered before jeopardy has attached."

Under either of these provisions, if jeopardy has attached there is on the part of the state no authority for taking an appeal. The general rule is that when a person has been placed on trial on a valid indictment or information before a court of competent jurisdiction, has been arraigned and has pleaded, and a jury has been impaneled and sworn, jeopardy has attached. *Schultz v. State*, 135 Wis. 644, 114

N. W. 505, 116 N. W. 259, 571; *McDonald v. State,* 79 Wis. 651, 48 N. W. 863; *State v. Parish,* 43 Wis. 395.

"Sec. 4645*a*. Any objection to a prosecution or the sufficiency of an indictment or information that may be raised by motion to quash, demurrer, plea in abatement, or special plea in bar, shall be so raised before a jury is impaneled or testimony taken, and unless so raised, shall be deemed waived; . . . Provided that the court may, in its discretion, on the application of the defendant, entertain any such objection at a later stage of the trial, but in every such case the application shall constitute a waiver, by the defendant, of any jeopardy that has theretofore attached."

If it be admitted for the purposes of this case that when the jury was sworn the defendant was thereby placed in jeopardy, it must be held, under the provisions of this statute, that when the defendant thereafter proceeded to a trial of the issue raised by the answer to the plea in bar it constituted a waiver of such jeopardy and the case then stood for all purposes as if jeopardy had not attached. Apparently the proceedings were not conducted either on the part of the court or the parties with reference to the provisions of sec. 4645*a*. We think, however, that it appears that the defendant entered upon the trial of the issue raised by the answer to the plea in bar under such circumstances as amounted to a waiver, although there was no express appeal made for the exercise of the court's discretion. The filing of the plea, the answer thereto, the offer of evidence by the defendant upon the issue raised by the plea, its reception by the court, and the demand of the defendant for trial by the court, amounted to the making of an application which constituted waiver on his part of any jeopardy that had theretofore attached, if any had attached. The jeopardy referred to in sec. 4724*a* is a jeopardy which has not been waived by the defendant and one which would protect him under the constitution. Manifestly the section cannot refer to a jeopardy which had attached but which has been waived; otherwise the provision of sec. 4645*a* requiring the

defendant as a condition of having his motion to quash, demurrer, plea in abatement, or special plea in bar heard after jeopardy has attached and as a condition of such hearing to waive such jeopardy, would be ineffectual.

The requirement that the defendant waive such jeopardy as has attached as a condition precedent to the exercise by the court of its discretion was manifestly made for the purpose of reserving to the state its right to a writ of error under sec. 4724*a*. Secs. 4645*a* and 4724*a* were ch. 187 of the Laws of 1911, relate to the same subject matter, and should therefore be read and construed together. Upon this branch of the case we hold, first, that at the time of the rendition of the judgment discharging the defendant jeopardy upon the second trial had not attached within the meaning of sec. 4724*a*; second, the state was entitled, under the circumstances, to take out a writ of error, and that the cause is properly before us.

Was the defendant, upon the first trial, acquitted of the charge of adultery? Upon that trial the court, having described the offenses charged in the first and second counts, charged the jury as follows:

"Both of these charges are based upon the same circumstances. If the jury should find the defendant guilty of one, then of necessity you could not find him guilty of the other. In other words, you cannot find the defendant guilty of more than one of the charges that are included in the information. . . . It appears in this case without dispute that the defendant was on September 3, 1916, a married man, and that the said Edna Mann was and still is an unmarried woman. . . . In your deliberations after retiring to your jury room, you should first consider the question whether the defendant is guilty of rape. . . . . If, however, you do not all become convinced by the evidence, beyond all reasonable doubt, that the defendant is guilty of rape, then you should next consider the question whether the defendant is guilty of adultery as charged."

The jury found the defendant guilty of rape, and under the instruction of the court made no finding as to adultery.

It is the contention of the defendant that he was thereby, in effect, acquitted of the charge of adultery. In *State v. Hill,* 30 Wis. 416, it was held that a verdict which finds a defendant guilty on a part only of an indictment or information containing several counts and is silent as to the other counts, is equivalent to a verdict of not guilty as to such other counts and must be so regarded. See, also, *Hechter v. State,* 94 Md. 429, 50 Atl. 1041, 56 L. R. A. 457; *State v. Martin,* 30 Wis. 216. Whether or not such a result should follow where the court, in effect, withdraws from the consideration of the jury a count, we shall not attempt to determine in this case. In this case the court instructed the jury that in the event that they found the defendant guilty of rape they could not of necessity find the defendant guilty of adultery, and the instruction amounted to a direction to the jury that if they found the defendant guilty of rape they should not consider whether or not the defendant was guilty of the crime of adultery. Under these instructions, the jury having found the defendant guilty of rape, the question of whether or not he was guilty of adultery was, in practical effect, withdrawn. It has been held that where the consideration of distinct offenses has been withdrawn from the jury and such distinct offenses were not considered, jeopardy did attach. *Montgomery v. State,* 136 Wis. 119, 116 N. W. 876; *Hoffman v. State,* 97 Wis. 571, 73 N. W. 51; *Perkins v. State,* 78 Wis. 551, 47 N. W. 827. Whether or not the defendant was acquitted, he certainly was placed in jeopardy as to the offense charged in the second count, that is, adultery; and if the defendant has not waived such jeopardy he cannot again be tried for that offense. By applying for a retrial as to the charge of rape and by suing out a writ of error pursuant to which the judgment of the trial court was reversed, the defendant waived any jeopardy which might theretofore have attached as to the crime of rape and lesser included offenses. *State v. Martin,* 30 Wis. 216; *Birker v. State,* 118 Wis. 108, 94 N. W. 643. We will consider later

whether the crime of adultery is included within the crime of rape.

Prior to the enactment of ch. 187 of the Laws of 1911, this court had before it a case involving the question as to the extent of the waiver of jeopardy by the defendant where he moved for a new trial as to one count of an information, the other count, which was for a separate offense, having been withdrawn from the consideration of the jury by the trial court, and this court held that the defendant had been in jeopardy as to both counts and that his appeal from a conviction on the count proceeded upon did not waive jeopardy as to the count which was withdrawn. *Schultz v. State,* 135 Wis. 644, 114 N. W. 505, 116 N. W. 259, 571. Unless the law has been modified by the enactment of ch. 187, we feel obliged to adhere to that decision. This brings us to a consideration of the state of the law and the effect of ch. 187.

Prior to the enactment of ch. 187, Laws 1911, the following propositions state the law relating to jeopardy and waiver of jeopardy:

First. Jeopardy attaches when a person has been placed on trial on a valid indictment or information before a court of competent jurisdiction, has been arraigned and has pleaded, and a jury has been impaneled and sworn and charged with his deliverance. Such jeopardy will sustain a plea in bar for subsequent prosecution for the same offense unless it has been waived.

Second. A motion for a new trial amounts to a waiver of jeopardy as to the offense of which the accused was convicted and of all lesser included offenses, but does not waive jeopardy as to cognate offenses charged in the indictment or information of a higher degree than that of which the accused was convicted.

Third. A motion for a new trial as to one offense is not a waiver of the jeopardy as to a distinct offense charged in the same information or indictment, even though after

the trial had begun such offense was withdrawn from the consideration of the jury.

Fourth. Where after jeopardy has attached a defendant is discharged by reason of any defect in the information or indictment or upon a plea in bar or motion to quash, there is no waiver of jeopardy and the accused cannot be again prosecuted for the same offense.

The decision of this court in the case of *Schultz v. State, supra,* was filed January 8, 1908. A rehearing was granted and a final decision was filed May 8, 1908. In that case the attention of the court and prosecuting officers was drawn very sharply to the state of the law relating to waiver of jeopardy. See dissenting opinion and concurring opinion.

On June 5, 1908, the opinion in the case of *Montgomery v. State,* 136 Wis. 119, 116 N. W. 876, was filed. In the *Montgomery Case* it was held that, where the trial court had withdrawn from the jury the consideration of lesser degrees of the offense than murder in the first degree, the defendants were neither acquitted thereby nor were they placed in jeopardy as to the minor offenses. The concurring opinion of Mr. Justice TIMLIN calls attention to the inconsistency of the law as stated in the two opinions.

In *Oborn v. State,* 143 Wis. 249, 126 N. W. 737, the question of whether or not the accused was in jeopardy arose under circumstances which do not make it material to the present inquiry.

There was introduced into the legislature of 1911 a bill striking out sec. 4724*a* as it then stood, and creating sec. 4724*a* as it now stands, except in one particular. As originally introduced, sub. 6, sec. 1, of the bill was:

"From an order or judgment of acquittal, rendered after jeopardy has attached, where the trial court has decided a question of law adversely to the state and the writ is applied for by the attorney general or with his written approval. The supreme court shall decide all questions of law thus presented, but their decision shall not effect reversal or subject the defendant to further prosecution. Upon the

granting of the writ in such case, the attorney general shall forthwith give notice thereof to the judge of the court in which the trial was had, who thereupon shall appoint some competent attorney to prepare and argue the case against the state. Such attorney shall be compensated, as provided in section 4713 of the Statutes, as amended, and shall receive in addition, his actual and necessary disbursements while attending the supreme court."

The present sub. (6) of sec. 4724*a* was numbered sub. (7) in the original bill. Upon the hearing before the judiciary committee the original sub. (6) was stricken out and sub. (7) of the original bill was renumbered sub. (6), and with this change the bill became a law in the form in which it was introduced. Sec. 4724*a* is as follows:

"A writ of error may be taken by and on behalf of the state in criminal cases:

"(1) From an order or judgment quashing, setting aside, or sustaining a demurrer to any indictment or information, or any count thereof.

"(2) From an order or judgment sustaining a plea in abatement or a special plea in bar made or rendered, before jeopardy has attached.

"(3) From any final order or judgment, adverse to the state, made or rendered before jeopardy has attached.

"(4) From an order granting a new trial.

"(5) From an order in arrest of judgment.

"(6) From an order or judgment of conviction upon a record containing rulings adverse to the state, in every case where the defendant prosecutes a writ of error. In every such case the whole record shall be carried before the supreme court and the case treated and presented as in cases of cross-appeals in civil actions, and all questions of law thus presented shall be decided by the supreme court."

Sec. 4645*a* has already been set out at length.

On behalf of the state it is contended that by ch. 187, construed with other statutes, a defendant, by a motion for a new trial, waives jeopardy to the extent that this court may determine in order that justice may be done to both the state and to the defendant.

On behalf of the defendant it is contended that inasmuch as sec. 4719 provides that "the supreme court shall have the power to review the order refusing to grant a new trial and render such judgment thereon as it may deem proper," the only thing before this court for review is the order refusing to grant a new trial, and that the defendant cannot be held to have waived jeopardy concerning an order that has not been refused and is not before the court.

In order to determine the purpose and effect of the enactment of ch. 187 it is necessary to re-examine the law relating to new trials, whether allowed by the circuit court or awarded by this court upon a writ of error in criminal cases. From the earliest times our statutes have provided, in accordance with the constitutional provision (art. I, sec. 21), that writs of error to review the judgment in criminal cases shall issue as a matter of course. Sec. 34, ch. 139, R. S. 1858. By sec. 6, ch. 149, R. S. 1849, it was provided that the circuit court might, within the time there stated, on the petition or motion of the defendant, grant a new trial for any cause for which by law a new trial may be granted or when it shall appear to the court that justice has not been done, and on such terms and conditions as the court shall direct. This provision has been continued and is now a part of the Statutes of 1919, sec. 4719. By ch. 172, Laws 1897, it was provided that

"When an application for a new trial under this section shall have been heretofore refused, or shall be hereafter refused, a writ of error shall, on the application of the defendant, be issued from the supreme court to bring such matter before it; and upon such writ the supreme court shall have the power to review the order refusing to grant a new trial, and render such judgment thereon as it may deem proper; provided, such writ shall be applied for within two years from the date of such order."

From an early day it was held that the law did not allow a writ of error in behalf of the state in a criminal case, but at the same time it was suggested that it would be wise and

proper for the legislature to provide for bringing writs of error to review any judgment rendered in favor of a defendant upon an indictment upon questions of practice where there had been no trial and acquittal by the verdict of a jury. *State v. Kemp,* 17 Wis. 669. The suggestion, however, does not seem to have been acted upon.

The question as to how far waiver of jeopardy extended in cases where the defendant moved for a new trial first arose in *State v. Martin,* 30 Wis. 216 (1872), and in that case it was held that a motion for a new trial did not constitute a waiver of jeopardy as to the offenses charged in the information or indictment higher than that of which the accused had been convicted. *Lesslie v. State,* 18 Ohio St. 390, was cited in support of this proposition, although it holds the exact opposite. See, also, *State v. Behimer,* 20 Ohio St. 572. In the case of *State v. Martin* the jury found the defendant "not guilty of murder but guilty of manslaughter in the second degree." The trial court set this verdict aside, and upon the second trial the jury found the defendant guilty of murder in the first degree. The conviction was set aside on the ground that the defendant had been acquitted on the former trial. While the statute authorizing the circuit court to grant a new trial upon such terms and conditions as the court might direct had been in force many years, no reference was made to it or to the power of the circuit court to prescribe conditions in the order setting aside the verdict and granting a new trial. This court has consistently adhered to the position taken in the case of *State v. Martin.* The whole matter was under review in the case of *Schultz v. State,* 135 Wis. 644, 114 N. W. 505, 116 N. W. 259, 571. There are expressions found in the opinions of the court from time to time inconsistent with this rule. *Hoffman v. State,* 97 Wis. 571, 73 N. W. 51; *Montgomery v. State,* 136 Wis. 119, 116 N. W. 876.

Some states have a statute providing that the granting of

a new trial places the parties in the same position as if no trial had been had. In those states a defendant who procures a new trial waives jeopardy and may be tried for murder although upon his first trial he was convicted of manslaughter only. *State v. McCord,* 8 Kan. 232; *Veatch v. State,* 60 Ind. 291; *People v. Palmer,* 109 N. Y. 413, 17 N. E. 213; *Comm. v. Arnold,* 83 Ky. 1. Such also is the federal law. *Trono v. U. S.* 199 U. S. 521, 26 Sup. Ct. 121. The fact that the matter is a subject of valid legislative regulation shows that the extent of the defendant's waiver of jeopardy in cases where he moves for or procures a new trial is not a matter within the protection of the constitutional guaranty. When he has once been tried and a judgment has been rendered, whether of acquittal or conviction, he has an absolute right to stand upon that judgment as a bar to further prosecution for the same offense. That is his constitutional right. When, however, he seeks to have the conviction set aside and to have a new trial which could confessedly be had only by a waiver of the jeopardy which had attached in the first trial, the extent of the waiver is a matter for legislative or judicial determination.

In 1 Bishop, New Crim. Law, beginning with sec. 1042, it is vigorously argued that the whole doctrine of waiver of former jeopardy is a misconception for the reason that the constitutional guaranty is a restraint upon the courts and it forbids them to make a blunder which shall compel a defendant to ask a second trial. The argument does not take into account the fact that at the common law the defendant in a felony case was not entitled to a new trial. 16 Corp. Jur. p. 1117, § 2615, and cases cited; *Buessel v. U. S.* 258 Fed. 811, 815; *People v. Marble,* 38 Mich. 309. Once convicted, the only relief from an erroneous judgment was the granting of a stay, during which an application might be made for a pardon. *U. S. v. Gibert,* 2 Sumn. 19, at p. 39 (1834), opinion by Mr. Justice STORY; *Ohms v. State,* 49 Wis. 415, 421, 5 N. W. 827. In this country the procedure for new

trials in criminal cases and the conditions under which trials shall be granted are purely statutory. *People v. Marble,* 38 Mich. 309; *People v. Schmidt,* 216 N. Y. 324, 110 N. E. 945 and cases cited. When this circumstance is taken into account and given its proper weight, the criticism of the courts by the learned author, in which he says that "a blind reception of mere judicial authority nearly banishes the purer reasonings of the law and true juridical wisdom," is not warranted. By an unbroken line of judicial authority in this country it is held without exception that a motion for a new trial is a waiver of the jeopardy by the defendant as to the offense of which he has been convicted. The only conflict of authority is as to the extent of the waiver. In the states of Nevada, Georgia, Utah, and Missouri, and under federal law, a motion for a new trial where a defendant has been convicted of a lower degree of manslaughter or murder is a waiver of jeopardy as to all higher degrees. *State v. Goddard,* 162 Mo. 198, 62 S. W. 697; *State v. Kessler,* 15 Utah, 142, 49 Pac. 293; *Brantley v. State,* 132 Ga. 573, 64 S. E. 676; *In re Somers,* 31 Nev. 531, 103 Pac. 1073; *Trono v. U. S.* 199 U. S. 521, 26 Sup. Ct. 121. In *Trono v. U. S.* the court said (at p. 533):

"In our opinion the better doctrine is that which does not limit the court or jury, upon a new trial, to a consideration of the question of guilt of the lower offense of which the accused was convicted on the first trial, but that the reversal of the judgment of conviction opens up the whole controversy and acts upon the original judgment as if it had never been. The accused by his own action has obtained a reversal of the whole judgment, and we see no reason why he should not, upon a new trial, be proceeded against as if no trial had previously taken place. We do not agree to the view that the accused has the right to limit his waiver as to jeopardy, when he appeals from a judgment against him. As the judgment stands before he appeals, it is a complete bar to any further prosecution for the offense set forth in the indictment, or of any lesser degree thereof. No power can wrest from him the right to so use that judgment, but

if he chooses to appeal from it and to ask for its reversal he thereby waives, if successful, his right to avail himself of the former acquittal of the greater offense, contained in the judgment which he has himself procured to be reversed. . . .

"When at his own request he has obtained a new trial he must take the burden with the benefit, and go back for a new trial of the whole case."

A review of the history and development of the principle that an accused should not be twice placed in jeopardy of life or limb for the same offense leads irresistibly to the conclusion that the evolution of the doctrine of waiver of the right was an inseparable incident to its application to the conditions which existed under our constitution and laws. Under the common law of England, in cases of conviction, there being no procedure by means of which the accused could obtain a new trial, the question of whether or not jeopardy in such cases was waived did not and could not arise. The statement found in Blackstone (book 4, p. 361), that where the jury have found the prisoner guilty contrary to the evidence the verdict has been set aside and a new trial granted by the court of King's Bench, applies only to misdemeanors. *U. S. v. Gibert,* 2 Sumn. 19, at p. 45.

In applying the doctrine of waiver of former jeopardy the courts of various jurisdictions have arrived at results widely at variance, and where the matter has been regulated by statute the statutory provisions are far from uniform. No doubt the most logical holding is that of the courts of the United States, which hold that a motion for a new trial is a waiver of all jeopardy under the indictment, both as to the offenses of which the accused was convicted and as to those of which he was by implication acquitted, and that the granting of a motion for a new trial places the entire matter where it stood at the beginning. Logically there is no more reason for holding that a prisoner waives jeopardy as to included offenses lower than that of which he is convicted than that he waives jeopardy as to the higher offense with

which he was charged in the information. The same reasoning applies to the one as to the other. The ground upon which the distinction is made is that he would not willingly waive the jeopardy as to the higher offense, but in waiving jeopardy as to the offense of which he was convicted he evinces a willingness to waive the jeopardy as to the lower offenses. The law having provided, contrary to the course of the common law, a method whereby the accused may secure a new trial, the conditions upon which such privilege shall be enjoyed by the accused should not rest with the accused but with the law. As has been many times pointed out (*Brantley v. State,* 132 Ga. 573, 64 S. E. 676), the doctrine of implied acquittal (*State v. Hill,* 30 Wis. 416) rests upon the proposition that the accused has been convicted of one offense and thereby impliedly acquitted of others. If the conviction be set aside, the facts out of which the implication arose no longer exist. When this is done at the instance of the accused, the whole matter stands as if there had been no trial. There is nothing to indicate that the legislature, by the enactment of ch. 187, intended to adopt this rule. Had it intended to do so it would no doubt have enacted a law similar to that of the state of New York, which provides that in cases where a new trial is granted upon the motion of the accused the matter shall stand for trial as if no trial had been had.

The doctrine of implied acquittal having been adopted in this state, we do not propose to overrule it. Under the decisions of this court the accused having the right to determine the extent of his waiver, we do not propose to overrule the settled law upon that proposition. The legislature, however, having provided that when the accused, seeking a new trial, brings a writ of error, the state shall have a right to a review as to other matters occurring upon the same trial, we think it follows as a necessary consequence that when the accused brings a writ of error he waives the jeopardy which

had theretofore attached in that trial so far as is necessary to give the state an effective review of other questions arising upon the same trial.

Under the provisions of ch. 187, therefore, we are of the opinion that all dilatory pleas and pleas in bar must be heard before jeopardy attaches, or if heard thereafter at the request of the accused or under circumstances that amount to a request, such jeopardy as has attached is waived and the hearing proceeds as if the questions were raised before jeopardy had attached.

When the accused sues out a writ of error the state has the right to sue out a writ of error, in which case the matter must be treated as stated, as cross-appeals. Under the present statute there will, of course, always remain this distinction: that if upon the review sought by the accused the determination of the trial court is affirmed, there can be no further inquiry into the matter, for the judgment of conviction would stand as a bar to a retrial of the issues, and under the doctrine of implied acquittal the conviction as to one count or offense being affirmed, it would operate to sustain, in effect, the acquittal as to other offenses charged in the indictment or information. Where, however, upon the review sought by the accused, the judgment of conviction is set aside, the whole record is thrown open in cases where the state has brought a writ of error, and if upon such review it appears that there was a misdirection of the jury or other prejudicial error with respect to other offenses charged than that of which the accused was convicted, the cause may be remanded for a trial as to such other offenses, and under such circumstances the accused would not be entitled to plead former jeopardy or former acquittal, it having been at his instance and request that the judgment of conviction was set aside. Any other conclusion would render the provision of the statute giving the state a right of review nugatory. Our conclusion that such was the legislative purpose is strengthened by reason of the fact that sub. 6, sec. 1,

as originally written, which was intended to give the state such a review, was stricken out. Where the accused prosecutes a writ of error and the state prosecutes no writ of error, the rights of the accused remain as they were before the statute was enacted. Upon such a proceeding the sole question before this court would be whether or not the accused was rightly convicted, and if, upon such a review, it appears that there was prejudicial error, he would subject himself to a new trial as to the offense of which he was convicted and of lesser included offenses only. What is here said applies to cases where the accused is charged with a higher offense than that of which he is convicted and to cases where the acquittal is by implication and where consideration of a distinct offense is withdrawn by the court from the consideration of the jury.

In this case the state took no writ to review the action of the trial court in withdrawing from the jury consideration of whether or not the defendant was guilty of the crime of adultery. The state not having availed itself of the right conferred upon it by sub. (6), sec. 4724*a*, the matter must be determined in accordance with the law as it stood prior to the enactment of that section, and in that case it is ruled by *Schultz v. State*, 135 Wis. 644, 114 N. W. 505, 116 N. W. 259, 571, unless adultery is a lesser offense included in the information for rape.

The question of whether the crime of adultery is a lesser offense included within the information for rape is ruled by *State v. Hooks*, 69 Wis. 182, 33 N. W. 57. See, also, *State v. Shear*, 51 Wis. 460, 8 N. W. 287; *Vogel v. State*, 138 Wis. 315, 326, 119 N. W. 190.

Adultery not being a lesser offense included under the charge of rape and the state having taken out no writ of error, the trial court correctly held that the defendant was in jeopardy upon the first trial as to the count in the information charging him with adultery and that the motion for a new trial and the subsequent prosecution of the writ of error

to review the proceedings which resulted in his conviction of the crime of rape did not constitute a waiver of jeopardy as to the charge of adultery.

The result arrived at in this case leaves the law of this jurisdiction in respect to the matter of waiver of jeopardy different from that in any other state. This is due to the fact that in the early history of the state it was held that the right to limit the extent of the waiver rested with the defendant. We think it better to depart from the established rules no farther than is necessary to give the state the right to an effective review under the provisions of sec. 4724*a*, even though a result is arrived at which might not be reached if we were at liberty to consider the matter as one of first impression.

By the Court.—Judgment affirmed.

GUARDIANSHIP OF REED.

March 8—April 5, 1921.

Spendthrifts: Idleness and intemperance: Appointment of guardian by county court: Trial on appeal to circuit court: Evidence.

1. On proceedings for the appointment of a guardian, it is *held* that if the testimony produced before the county court was similar to that given at the trial on appeal to the circuit court, showing that a farmer had been idle and intemperate for more than two years, had paid practically no attention to his property, had not cared for his live stock or paid the taxes on his farm, and had permitted the farm to grow up to weeds, the appointment of a guardian on the ground that he was a spendthrift would have been justified.
2. On appeal from the judgment of the county court the only question before the circuit court was the competency of the alleged spendthrift to care for and manage his property at the time of the hearing in the circuit court, regardless of his competency or incompetency at the time of the hearing in the county court.
3. Liberty of the person and the right to the control of one's own property are sacred rights which should not be taken away or withheld except for very urgent reasons.

APPEAL from a judgment of the circuit court for Rock county: GEORGE GRIMM, Circuit Judge. *Affirmed.*

Petition for appointment of a guardian. The matter was first heard in the county court and resulted in the appointment of a guardian. On appeal to the circuit court a new trial was had. The trial judge found that the appointment by the county court was justified at the time on the ground of the ward being an idler and spendthrift, but that owing to having mended his ways the necessity for guardianship had ceased. The judge found that there was not and had not been mental incompetency. Judgment was given revoking the appointment of the guardian and for his discharge. From this judgment the petitioners, children of the ward, appeal.

At the time of the trial respondent was sixty years of age. For a good many years he and his wife had lived on a small farm consisting of about fifty-one acres near Janesville, until the death of Mrs. Reed in February, 1914. Before her death the business management had for the most part been carried on by her. She took charge of the money, paying the family expenses and those of appellants. The family consisted of the father, mother, four sons, and two daughters. Respondent had not been very industrious, was intemperate, and spent considerable of his time in saloons. For some years most of the work on the farm had been done by the children.

Respondent bought the land about the time of his marriage in 1881, but four or five years afterward deeded it to his mother, and she to his wife. The latter had remained the owner until a short time before her death, when she conveyed the homestead forty acres to respondent and some other land to their son Thomas Frank Reed. On the administration of the estate of Mrs. Reed all of her real estate except the homestead was assigned to the children, subject to the life estate, and the personal property was assigned to the children. The land consisted of the homestead, about

eleven acres adjacent, and a house and lot in Janesville. The property was estimated to be of the value of about $20,000.

After the death of the mother respondent deeded the homestead to his son Frank. He claimed that the children importuned him to do this, making glowing promises, but that after the deed was made their conduct toward him wholly changed. This was denied by the children. After this deed respondent was anxious to have the land reconveyed, and what amounted practically to a life estate in all the land was thereupon conveyed to him. He desired and claimed a deed to the whole interest in the lands and held two contracts bearing on his right thereto, but was unable to get the deed from his son. Since this proceeding was commenced he has started an action to accomplish this end.

The father's differences with his children over these matters caused much hard feeling on his part toward them, and to this cause he attributed the condition which led to the appointment of the guardian. It is claimed by the respondent that this trouble and the death of his wife were the causes of his allowing the farm to lie practically unused and uncared for in the years 1915 and 1916.

At the time of the trial the respondent was working regularly as a teamster, was taking good care of his horses, had saved about $400 which was deposited in the bank, and had helped to arrange advantageous leases both of the farm and of the house and lot.

F. C. Burpee and *Charles E. Pierce*, both of Janesville, for the appellants.

For the respondent there was a brief by *Nolan & Dougherty* and *Jeffris, Mouat, Oestreich, Avery & Wood*, all of Janesville, and oral argument by *O. E. Oestreich* and *W. H. Dougherty*.

JONES, J. It is not necessary to enumerate in detail the causes which led to the petition for guardianship which was filed in February, 1917. For about two years after the

death of respondent's wife he had paid practically no attention to his property. The farm had grown up to weeds, the live stock had not been cared for, the taxes had not been paid. The management of the property could hardly have been worse. If a petition for guardianship had not been made it is quite possible that the entire estate would have been wasted. Respondent had not only been idle and intemperate, but in some of the business he undertook to transact had shown gross incapacity. If the testimony produced before the county court as to respondent's acts and mental condition during a period of two years or more was at all similar to that given at the trial in the circuit court, the appointment of the guardian was entirely justified.

Soon after the proceeding was commenced in the county court an arrangement was made between respondent and the petitioners by which respondent's brother was to take charge of the property during the pendency of the proceedings. The case was not tried in the county court until nearly two years after it was commenced, and the judgment which is appealed from was rendered June 4, 1920.

The only question before us is whether at that time respondent was competent to care for and manage the property, worth about $20,000. No claim was made that respondent was insane. It is argued by counsel for petitioners that it was not drunkenness nor idleness that made him incompetent to manage property, but "inherent defects."

Respondent may have been and probably was a spendthrift within the meaning of the statute when the guardian was appointed, but it by no means follows that he remained in that class up to the time of the trial in the circuit court. Although many witnesses were called on both sides who testified to facts and opinions bearing on the issue, the testimony for petitioners for the most part related to transactions which occurred several years before the trial, and their opinions were necessarily largely based on facts occurring during a period when respondent was clearly in such a state

of mind and under the influence of such habits that much of the time he was incapacitated to manage business affairs.

After hearing the testimony, including that of the respondent, which was given quite fully and with reasonable intelligence, the trial court came to the conclusion that there had been such a change in the habits and mental condition of respondent that a guardian was no longer necessary.

We appreciate the strong feeling of the children that the property which had been accumulated by the labor of the whole family ought to be preserved, and we are giving due consideration to that feeling. But it must also be borne in mind that liberty of the person and the right to the control of one's own property are very sacred rights which should not be taken away or withheld except for very urgent reasons. The trial judge had better opportunity than we to arrive at a just conclusion on the pure questions of fact in issue, and we do not feel justified in reversing the judgment. This decision is not to be interpreted as in any way approving the conduct of the respondent in the management of his property in 1915 and 1916, and if he should lapse into his former spendthrift habits it would be proper for his children to again make application for the appointment of a guardian.

By the Court.—Judgment affirmed.

GIBLIN, Appellant, vs. GIBLIN and others, Respondents.

March 8—April 5, 1921.

Deeds: Possession in grantee: Presumption: Consideration: Tenancy in common: Adverse possession by one cotenant: Circuit courts: Jurisdiction to construe wills: Perpetuities: Devise to bishop to found new church: Certainty of devisee: Devise on condition.

1. Where one of several heirs of the record owner of land claimed the equitable interest therein because she had furnished the money to pay therefor, and after the owner's death took possession of the property, paid the taxes, and collected the rents

without accounting to the other heirs, all but one of whom deeded their interests to her, the interest of that heir, if any, was barred by the lapse of more than fifty years since possession of the property was so taken and held.

2. Where a deed was found in the possession of the grantee after her death, the presumption of delivery of the deed is not rebutted merely by a showing that the grantors had access to the place where the grantee kept the deed, since evidence to rebut the *prima facie* effect of the grantee's possession must be clear and satisfactory.
3. Such possession by the grantee creates a presumption that there had been an actual delivery of the deed.
4. Where deeds recite a consideration and are under seal, a consideration is presumed in the absence of evidence that there was none.
5. The special jurisdiction of county courts for the construction of wills in pending probate proceedings does not supersede or suspend the jurisdiction of the circuit court to construe such wills when all the parties are before it.
6. A devise of real property to a bishop or his successor, with power to sell the property and use the proceeds for the founding of a new church, is a gift to a definite devisee and is not a perpetuity.
7. A devise to "St. Paul's Roman Catholic *Church* of Beloit" of the "mortgage which I now hold against the said church" sufficiently designates the devisee, although there was no corporation of that name in the city, where the testatrix was the owner of a mortgage executed by St. Paul's Roman Catholic *Congregation* of Beloit, which was the only St. Paul's Roman Catholic congregation in that city.
8. A devise of real estate to a university on condition that it care for the tomb of the testatrix for all time is merely a conditional devise and not a perpetual trust, and is valid regardless of whether the university has authority to accept a perpetual trust. *State Historical Society v. Foster*, 172 Wis. 155, followed.

APPEAL from a judgment of the circuit court for Rock county: GEORGE GRIMM, Circuit Judge. *Affirmed.*

Action for the partition of three lots in the city of Beloit. Plaintiff is the granddaughter of Paul Broder, Sr., and claims through her mother, Margaret Giblin, *née* Margaret Broder. Paul Broder, Sr., emigrated from Ireland to this country in 1850. At the time of his death some time prior

to 1867 his family consisted of his oldest son, James H., who died in 1867; his wife, Alice C., who died in 1875; his son Paul, Jr., who died December 14, 1881; his daughter Mary, who died December 11, 1901; his daughter Margaret, mother of plaintiff, who died December 14, 1902; his daughter Catherine, who died May 5, 1905; his daughter Alice B., who died February 23, 1918; and his daughter *Ann Mallams,* who is still living. Paul Broder, Sr., and his wife acquired no property of any consequence and in their later years were supported by their children. The sisters Alice, Mary, and Catherine early went into the millinery business in Beloit and later had shops in some of the near-by cities. Alice was the head of the business and it was conducted in her name. There is evidence to the effect that she furnished the money to pay for the first two lots which were bought in the name of James H. Broder, who held the record title to them at the time of his death in 1867. The record title to the third lot was held by Paul Broder, Jr., at the time of his death in 1881. Due administration upon the estate of Paul Broder was had and his title at an administrator's sale was purchased by Catherine Broder, who subsequently conveyed it to Alice Broder. After the death of James H. Broder, Alice Broder acquired by deed the title of all her sisters and brothers to his property except that of her sister Margaret Giblin. In 1888 or 1889 and again a year or two before the death of the latter, or about in 1900, Alice tried to obtain a deed from her but did not succeed. At no time while the Broders lived in Beloit was Margaret Giblin a member of the Broder family. She was married in the East and lived nearly all her lifetime in Jefferson county, this state. She had actual as well as constructive notice that Alice was claiming the property adversely and that her possession was open, exclusive, and adverse to her. Alice in the last interview with her told her that she did not need a deed from her but preferred to get one, and that never would Margaret get any of the property. From the time James H.

Broder died Alice took possession of the property, made valuable improvements upon it, paid all the taxes, and used the proceeds of the rent as her own. Neither Margaret nor any of her children made any claim to the property till after the death of Alice in 1918, when this action was begun. From the above facts found by the court it held that Alice Broder at the time of her decease was the owner of the property described in the complaint and that the plaintiff and those claiming under Margaret Giblin had no interest therein. The court also construed the will of Alice Broder and held certain bequests therein valid as against plaintiff and those who claim under Margaret Giblin. The bequests will be referred to in the opinion. From a judgment entered accordingly dismissing the action upon the merits the plaintiff appealed.

For the appellant there was a brief by *Frank R. Bentley* of Baraboo, attorney, and *Charles E. Pierce* of Janesville, of counsel; and the cause was argued orally by *Mr. Bentley*.

For the respondents there was a brief by *Woolsey & Arnold* of Beloit and *Nolan & Dougherty* of Janesville, and oral argument by *T. W. Woolsey* and *W. H. Dougherty*.

VINJE, J. The facts found by the court as briefly outlined in the above statement are not in dispute except in so far as they may allege conclusions, and they sustain the result reached as to adverse possession for reasons stated in *Hahn v. Keith*, 170 Wis. 524, 174 N. W. 551, and in cases there cited. That case rules this as to the question of adverse possession against tenants in common. We have here a case where for thirty-five years the mother, with full knowledge of all the facts, living in a near-by city, made no claim in her lifetime for an accounting or a share in the property or its rentals, and her children for fifteen years more remained silent as to any claim on their part. During all that time Alice managed, used, and improved the property, claiming it as her own to the exclusion of Margaret and her chil-

dren. It is peculiarly a case where acts speak more effectively than words. Title by adverse possession is founded upon the salutary principle that claims, if not seasonably made, will be held to be waived. The law allows twenty years for the making of such claims. Here fifty years and more have elapsed since they first ripened through the death of James H. Broder in 1867, if he in fact held the equitable as well as the legal title at the time he died—a fact not shown by the testimony.

Plaintiff also makes claim as the heir of Catherine and Mary on the ground that no delivery of the deeds from them and *Ann Mallams* to Alice is shown. The evidence discloses that after the death of Alice these deeds were found in a basket in a bedroom closet in the house in which Alice, Catherine, Mary, and *Ann Mallams* lived. The basket contained other valuable papers belonging to Alice. The only evidence claiming to rebut the presumption of delivery is that given by *Ann Mallams,* who makes no claim to any of the property except under the will of Alice, to the effect that she, Mary, and Catherine could have gone to the basket at any time had they desired, but that she did not meddle with Alice's papers and she presumed her sisters did not meddle either. The presumption of delivery of deeds found in the possession of a deceased person is not rebutted by showing that the grantors had access to the place where the grantee kept them, for evidence necessary to rebut the *prima facie* effect of the grantee's possession must be clear and satisfactory. *Chase v. Woodruff,* 133 Wis. 555, 113 N. W. 973. If there has been an actual delivery of a deed—and possession thereof by the grantee presumes that there has,—then the fact that the grantor has access to the place where the grantee keeps it is immaterial. Indeed, the grantee may redeliver it to the grantor for safe keeping without affecting the validity of the delivery. So we conclude that there was a valid delivery of the deeds from Catherine and Mary to Alice.

The deeds recite a consideration, are under seal, and in

the absence of evidence that there was no consideration one is presumed. The fact that *Ann Mallams* did not know whether there was a consideration does not disprove the presumption that there was one.

Alice Broder died testate and her estate is being probated in the county court of Rock county. Certain devises in her will are challenged on the part of plaintiff, who claims they are invalid and therefore she takes as heir. These devises are subject to a life estate in *Ann Mallams*. Since the special jurisdiction of county courts for the construction of wills does not supersede or suspend that of circuit courts (*Burnham v. Norton,* 100 Wis. 8, 75 N. W. 304), since all the parties are before us and all the evidence is here, we shall briefly discuss and determine the construction to be given to the will of Alice Broder in so far as it affects the questions raised by the partition action.

The first devise challenged is of one lot to *Bishop Muldoon* of Rockford, Illinois, or to his successor in office. It reads:

"I give and devise unto the *Right Reverend Bishop Muldoon,* of Rockford, Illinois, or his successor in office, the following real estate [describing it], with power to sell and dispose of the same and to use the proceeds thereof for the purpose of establishing a church in South Beloit, Illinois, said church to go by the name of St. Peter and St. James Catholic Church."

Bishop Muldoon has in writing accepted the devise and agreed to carry out its object.

It is argued that the devise violates the rule against perpetuities as declared in sec. 2039, Stats. How it does is not pointed out and we are unable to discover its invalidity in that respect. The devise expressly empowers the devisee to sell at any time after the devise takes effect, and the object of the devise is sufficiently certain and definite to permit execution. The fact that the new church was not in being at the time the devise was made does not invalidate the gift. The

gift was to *Bishop Muldoon,* not to the new church. So there was a definite devisee in being capable of taking at the time the will was made. It is shown by the evidence that the Bishop has the power to create new churches and his acceptance of the trust implies that he will create the one mentioned in the devise.

The next two devises challenged are: "I give and devise lot number four (4) in Hackett's Addition to Beloit, Rock county, Wisconsin, according to the recorded plat thereof, unto the St. Paul's Roman Catholic *Church* of Beloit, Wisconsin, with power to sell and convey the same and use the proceeds thereof for church purposes," and "I give, devise and bequeath unto the St. Paul's Roman Catholic *Church* of Beloit, Wisconsin, the mortgage which I now hold against the said church."

The claim that the first devise violates sec. 2039, Stats., is as unfounded as the claim that the devise previously considered violated it. It appears from the evidence that there was no corporation by the name designated in the devise, but that there was a corporation named St. Paul's Roman Catholic *Congregation* of Beloit and that it was the mortgagor of the mortgage mentioned in the second devise. This without other evidence sufficiently designates the devisee. It was also in evidence that there was only one St. Paul's Catholic congregation in Beloit. No one did or could mistake who was intended to take, so the claim that the devise is void for lack of definiteness fails.

The last devise we shall discuss is one reading:

"I give and bequeath unto *Marquette University of Milwaukee* that part of lot 4, block 60, . . . upon condition, however, that the said *Marquette University* shall agree to take charge of my tomb situate in Beloit city cemetery, keep the same in repair, and pay all lawful charges, assessments, and expenses against the same for all time."

It is urged this created a perpetual trust and that *Marquette University* cannot accept such a trust. We shall not

inquire into the question of whether or not it can accept a perpetual trust for the reason that none is created by the devise. It is a devise with a condition, and the condition has been agreed to in writing by the *University*. No trust is created. The property devised may be sold without being burdened with the condition. That remains the individual agreement of *Marquette University*, to be enforced in case of a breach like any other individual obligation. The devise comes within the principle discussed in *State Historical Society v. Foster*, 172 Wis. 155, 177 N. W. 16, being one subject to a condition but creating no trust. There the taking by plaintiff was held to be subject to the payment of an annuity to Mrs. Burrows but creating no trust to be executed on the part of plaintiff.

Since the devises attacked by plaintiff are held to be valid, it becomes unnecessary to determine the validity of the residuary clause in the will.

By the Court.—Judgment affirmed.

ROSENBERRY, J., dissents.

KUNITZ, Respondent, vs. RUSKE, Appellant.

March 8—April 5, 1921.

Contracts: Dispute concerning agreed price of doing work: Evidence of reasonable value of work: Competency.

1. To render evidence of the value of services admissible on an issue as to the contract price for such services, there must be a direct conflict as to the contract price, and the difference must be so great that the reasonable value thereof from the standpoint of the parties when the contract was made may reasonably discredit the evidence on one side and corroborate that on the other.
2. Where plaintiff claimed defendant agreed to pay $500 for plastering and $375 for doing the stucco work on his house, while defendant claimed plaintiff was to do the whole work for $500, there was such a direct conflict and such a differ-

ence in the amounts claimed as warranted the court in admitting evidence of the reasonable value of doing the work and furnishing the materials.

3. On an issue as to the agreed price of doing certain work, evidence as to the actual cost is incompetent; but where there was evidence that the reasonable value of the work and materials was from $900 to $950, the erroneous admission of evidence that the actual cost of the work was $924 was not prejudicial.

APPEAL from a judgment of the circuit court for Dodge county: MARTIN L. LUECK, Circuit Judge. *Affirmed.*

The plaintiff, as a contractor, made an arrangement with the defendant by which the plaintiff was to plaster the defendant's house and also to stucco the defendant's house. He was also to do some additional work as to which there is no dispute. It is the contention of plaintiff that defendant agreed to pay for plastering the house $500, for stuccoing the house $375. It is the contention of the defendant that the plaintiff was to do the entire work for $500. The jury found in favor of the plaintiff and judgment was rendered accordingly, from which the defendant appeals.

For the appellant the cause was submitted on the brief of *Otto Kuenzli* of Watertown.

For the respondent there was a brief by *Kading & Kading* of Watertown, and oral argument by *C. A. Kading.*

ROSENBERRY, J. It is the contention of the defendant that the court erred in admitting testimony over the objection of the defendant in two particulars:

First. The court permitted the plaintiff to show the reasonable value of the services and materials rendered and furnished by the plaintiff to the defendant.

Second. The court permitted the plaintiff to show the actual cost of doing the work.

The plaintiff testified that the defendant requested him to make an estimate; that he measured up the work, met the defendant near the plaintiff's house, having with him the

memorandum book in which he had made the figures for his estimate; that he told the defendant that he would do the plastering for $500 and the stuccoing for $375, which amounts he claims the defendant agreed to pay him. To support his claim the plaintiff then offered evidence as to the reasonable value of the material and work, which amounted to $900 to $950, and also showed that the actual cost of doing the work was $924.60, which included ten cents per hour of every man on the job as a profit for the plaintiff.

The defendant testified that he, accompanied by his wife and one Smith, went to the plaintiff's place in a car; that the plaintiff did not have with him and did not read from a book, but that the plaintiff stated that he would do the job for $500, excepting the cistern and other items as to which there is no dispute. The defendant denied that some of the men who, according to the plaintiff, had worked upon the job, had as a matter of fact worked there. The defendant was corroborated by the testimony of his wife and by the testimony of Smith, who appears to have been a disinterested witness. There is no claim on either side that a contract was made at any other time or place.

1. Admissibility of evidence as to the reasonable value of the labor and materials performed and delivered for the benefit of the defendant.

The general rule is stated thus: Where the parties to a special contract for services are in dispute as to the compensation fixed by the contract, evidence of the value of the services is admissible as bearing upon the probabilities of the case, that is to say, as tending to show which statement is more likely to be true. The purpose of the evidence is to corroborate the party offering it as giving probability to his statement in regard to the amount fixed by contract and to cast doubt and improbability upon the statement made by the other party. L. R. A. 1915C, 1213, and cases cited. Wisconsin, however, has adopted the rule with substantial

qualifications. To render such evidence admissible there must be a direct conflict as to the contract price. The difference must be so great that the reasonable value thereof from the standpoint of the parties when the contract was made may reasonably discredit the evidence on the one side and corroborate that on the other, affording some reasonable ground for believing that the contract was at the price most in harmony with such evidence. *Anderson v. Arpin H. L. Co.* 131 Wis. 34, 48, 110 N. W. 788. See, also, *Kosloski v. Kelly,* 122 Wis. 665, 100 N. W. 1037; *Oliver v. Morawetz,* 95 Wis. 1, 69 N. W. 977; *Brunnell v. Hudson S. M. Co.* 86 Wis. 587, 57 N. W. 364; *Kvammen v. Meridean M. Co.* 58 Wis. 399, 17 N. W. 22.

In the *Anderson Case* the difference between the parties was about eight per cent., and the trial court held that the difference was not sufficiently great to warrant the introduction of evidence as to the reasonable value of doing the work, and this court held that in so holding the trial court was not clearly wrong. The rule, no doubt, leaves a considerable latitude for the exercise of the discretion of the trial court. In this case the conflict between the parties was direct, and the difference between the amount claimed on the one side and on the other so great as to warrant the trial court in admitting evidence as to the reasonable value of doing the work and furnishing the materials in question. Taking defendant's claim as a basis, the difference amounted to seventy-five per cent.

2. Was the evidence as to the actual cost of doing the work admissible?

The reason for admitting evidence of the reasonable value of doing the work does not apply to evidence as to the actual cost of doing the work. The parties may have and usually do have in mind the reasonable value of supplying the thing or doing the work contracted for. Neither party can, however, have in view at the time of the making of the contract the actual cost of doing the work because it is

unknown. The actual cost of doing the work, therefore, cannot have influenced either party to the negotiations. It must be borne in mind that the subject of inquiry is not what the contract price should in equity and good conscience have been, but what it in fact was. If the parties agreed upon a price, that price must control whether it be reasonable or not or whether the cost of doing the work greatly exceeded it or not. It can only be set aside for fraud or mutual mistake. Evidence of reasonable value is admitted because it was an element which both parties undoubtedly had in mind at the time of the making of the contract, and if the claimed price is grossly disproportionate to the reasonable value, evidence of such reasonable value, in case there is a direct conflict and the difference is great, tends to corroborate one party and discredit the other. Evidence as to the actual cost of doing the work could not have been in contemplation by either of the parties and therefore no inference as to what was the actual price agreed upon can be drawn therefrom.

Language used by Judge COOLEY, *arguendo,* in *Campau v. Moran,* 31 Mich. 280, has been made the basis of some decisions sustaining the right of a party to introduce evidence of the actual cost of doing work. In *Campau v. Moran,* Moran sued Campau for $200, alleged to be the agreed price of doing certain work, Moran to be the judge of the sufficiency of the work done. Upon the trial Moran proved that the work done was worth more than $200. The court said:

"We think the court erred. Had the plaintiff sought to recover on a *quantum meruit* after failing to fulfil the contract according to its terms, evidence of the value of his work would have been pertinent; but this was not the theory of his case. He claimed under a special contract performed on his part, and evidence of the cost or value of the work was unimportant and tended to withdraw the attention of the jury from the real issue."

Moran was also permitted to show, in reply to defendant's case setting up a different contract requiring a more substantial structure, that it would be impossible to build a more substantial structure at the place where this was built for the contract price agreed upon. This was held error. The court said:

"Such evidence had nothing to do with the case and could have no legitimate bearing on the issue. It is not so clear, however, that the evidence actually given by the witness under the ruling was objectionable. Campau testified that he made a very different contract with plaintiff, calling for a much more substantial structure. When the parties were thus distinctly at issue upon the terms of the contract, evidence that the cost of performance of such a contract as the defendant set up would be greatly in excess of the contract price would certainly afford some reasonable ground for believing that defendant is in error on the facts."

Campau v. Moran is referred to in *Kvammen v. Meridean M. Co.* 58 Wis. 399, 17 N. W. 22, and the remark of Judge COOLEY last quoted referred to with apparent approval in *Valley L. Co. v. Smith,* 71 Wis. 304, at p. 307 (37 N. W. 412). When read in connection with the facts in the case, *Campau v. Moran* is not authority for the proposition that evidence as to the actual cost of doing work is admissible to sustain the plaintiff's claim of an express contract. In the *Campau Case* the evidence to which Judge COOLEY referred was the probable cost of doing the work under the contract as claimed by defendant. The defendant claimed an entirely different contract than that claimed by the plaintiff and calling for much more work than was actually done by the plaintiff. The actual cost of doing the work as claimed by the defendant, therefore, was unknown, and the probable cost could only be determined by estimate or by computing its reasonable value. *Campau v. Moran* is cited as sustaining the proposition that evidence of cost is admissible and also that it is not admissible where the plaintiff claims under an express contract. Taken out of its

context, the language last quoted does tend to support the contention that evidence of actual cost is admissible, but when read in connection with the facts it does not support that proposition.

Evidence of the actual cost of doing the work was not admissible and it should have been excluded. The evidence showed that the actual cost of doing the work was $924. According to the testimony offered the reasonable value of doing the work and furnishing the material was from $900 to $950 in round numbers. Under the circumstances of this case we think the admission of testimony as to the actual cost of doing the work and furnishing the material was not prejudicial, although it comes very close to the line.

By the Court.—Judgment affirmed.

FARMERS & MERCHANTS BANK, Respondent, vs. FREDERIKSEN, imp., Appellant.

March 8—April 5, 1921.

Husband and wife: Separate estate of wife: Wife as creditor of husband: Liability upon note signed with husband: Evidence: Recitals in note.

1. In an action at law upon promissory notes, a married woman may successfully assert her common-law inability, by reason of coverture, to make a binding promise to pay money, unless the circumstances bring her within the intent and meaning of the enabling statutes, particularly sec. 2345, Stats., giving a married woman the rights of a *feme sole* as to her separate property.
2. The fact that a wife was a creditor of her bankrupt husband did not give her such an interest in his financial welfare and business as would make her liable on a note with him under said sec. 2345.
3. The words "I hereby pledge my separate estate," written on the face of a note just above the signature of a married woman, do not place such note in any better position, so far as the rights of the holder are concerned, than other notes without such declaration.

APPEAL from a judgment of the circuit court for Ozaukee county: MARTIN L. LUECK, Circuit Judge. *Reversed.*

The defendants married in 1905. Prior thereto the appellant had owned and conducted a furniture store, and shortly afterwards the appellant sold the same to the defendant J. G. Frederiksen, and he agreed to pay her therefor the inventory price of about $2,800. He carried on the same, greatly enlarged it, and also built a homestead for the family.

At different times between October 2, 1907, and April, 1913, the appellant loaned to her husband over $20,000, all of which he agreed to repay to her.

In April, 1913, the plaintiff bank loaned to the defendant J. G. Frederiksen $700 which was used by him in his business and for which he gave his promissory note signed by the two defendants, the words, "I hereby pledge my separate estate," being written on the face of the note and just above the signature of the appellant. Such note was renewed in the same form in April, 1914, and again in April, 1915.

Another loan of $1,000 was made on September 24, 1914, by plaintiff and the proceeds placed to the husband's account and used by him in his business. This was signed by both defendants. It was renewed in the same form in November of the same year, again in March, 1915, and again in March, 1916. Plaintiff further loaned $600 December 13, 1915, placed the same to the credit of the husband, and it was used by him. This was evidenced by a promissory note signed by the appellant wife only. No representations were made by appellant to plaintiff and no conversation was had between them with reference to this matter.

In 1916 the defendant husband went through bankruptcy. The appellant filed a claim for over $33,000, which by stipulation and proceedings therein was finally allowed at the sum of $23,897.75, which included the liability of the husband to her for the purchase price of the business in

1905 and the several loans by her. The plaintiff also filed in said bankruptcy proceedings its claim based upon defendants' three loans above stated, including the one of $600 for which the note signed by appellant alone had been given, and other transactions. A fifteen per cent. dividend was paid by the bankrupt.

This action was then brought by the plaintiff against the husband and wife, defendants herein, for the balance due upon the last renewal notes for the $1,000 and the $700 respectively and the note of December, 1915, for $600. The appellant asserted nonliability on the grounds of her being a married woman and that she had incurred no liability affecting her separate property.

A special verdict was submitted, which was answered in substance as follows: (1) That the separate property of the defendant *Eugenia Frederiksen* was benefited by the loans in question; (2) that the money obtained by such loans was necessary for the use and enjoyment of her separate property; (3) that the money obtained on the loans was convenient for her use and enjoyment of her separate property.

Appropriate motions were made by both sides after verdict. Upon the hearing of such motions the court made his findings of fact to the effect that the appellant wife did not have any interest as owner in the undertaking and furniture business of her husband and that he was the sole owner thereof; that the defendant husband was the sole owner of the homestead and of the store building and lot upon which the store building was situated; that the appellant did not directly receive any part of the proceeds of either of the loans, and that she acquired or had no control whatever personally over said bank account or the proceeds from said loans, and also that the officers of the bank knew that the proceeds of the said loans were directly credited to the account of the husband. Thereupon judgment was ordered in favor of the plaintiff as against both defendants

for the amounts due under all said notes, with costs and disbursements. From the judgment, so far as it affected her, the defendant wife has appealed.

For the appellant there was a brief signed by *James F. Trottman,* attorney, and *Trottman & Trottman,* of counsel, all of Milwaukee; and the cause was argued orally by *Nelson S. Trottman.*

For the respondent there was a brief by *Carbys & Kenny* of Milwaukee and *William F. Schanen* of Port Washington, and oral argument by *J. O. Carbys* and *Frank C. Kenny.*

ESCHWEILER, J. This being an action at law to recover upon promissory notes signed by the appellant, a married woman, she is entitled to successfully assert her common-law inability by reason of her coverture to make a binding promise to pay money unless and except the circumstances in this case are such as to bring her within the intent and meaning of the enabling statutes and particularly sec. 2345, Stats. This latter is to the effect that every married woman may sue in her own name and have all the remedies of an unmarried woman in regard to her separate property, business, and earnings, and also provides that she "shall be liable to be sued in respect to her separate property or business, and judgment may be rendered against her and be enforced against her and her separate property in all respects as if she were unmarried."

It is undisputed in this case that she was not the owner of either the homestead or the real estate upon which the store building was placed, nor of the furniture and undertaking business conducted by her husband. These all belonged to the husband. The proceeds from these notes were used by the husband in the carrying on of the business and undoubtedly may be considered as having enabled him to either postpone the time of his bankruptcy, which but for such loans might have occurred earlier, or increased the amount of the dividend that his estate was enabled to pay the

creditors over that which would have been otherwise realized.

It is a conceded fact that at the time of the loans for which the notes in suit were originally given, the husband did not have property sufficient to meet all his obligations, including the amounts he then owed his wife. It is also not disputed that she had a separate estate consisting largely in stock of a corporation.

It is contended by respondent that the judgment against the wife can be supported on the theory that she, being a creditor of the husband, had such an intangible but substantial interest in his financial welfare and business that it was in the nature of such a property right in her as should be considered her separate property and estate within the meaning of the statute. That these loans being for the purpose of furthering his financial welfare, she as such creditor should have been deemed to have signed the various promissory notes for the loans to her husband for the purpose of and with the intent to benefit such suggested property right or interest of her own and that therefore she is liable.

Although manifestly the financial welfare of a husband is a matter of proper concern and interest to any wife, either with or without separate property, and his continuation in financial success naturally lessening any imperative calls upon her own resources, if any such she have, for her own or the family's support or well-being, yet such an interest and concern has not, in any decisions that we have found, been recognized as rising to the dignity of such a property right as would come within such a statute as is quoted above.

An obligation whereby a business conducted by the husband is to be continued in the joint names of the husband and wife is not sufficient to bind her to such an obligation. *Emerson-Talcott Co. v. Knapp*, 90 Wis. 34, 36, 62 N. W. 945. Her beneficial interest in a life insurance policy pledged by the husband to secure their joint note is not suf-

ficient. *Mueller v. Wiese,* 95 Wis. 381, 70 N. W. 485. Being a stockholder in a corporation is not sufficient to give validity to her guaranty of a note of the corporation as being a benefit to her interest as a stockholder. *Russel v. People's Sav. Bank,* 39 Mich. 671; 13 Ruling Case Law, 1301.

The possible incidental benefit to the real estate owned by a married woman by the location of a proposed business block in the vicinity is not sufficient to give validity to her subscription to a fund for that purpose. *Detroit C. of Comm. v. Goodman,* 110 Mich. 498, 68 N. W. 295. Property bought jointly by a husband and wife will not sustain liability on her part on a joint note for the same. *Doane v. Feather's Estate,* 119 Mich. 691, 78 N. W. 884.

The facts here do not bring this case within the holding in *Citizens State Bank v. Cayouette,* 169 Wis. 192, 172 N. W. 320, as is claimed by respondent. In that case the wife's real estate was directly benefited by the transaction.

We are constrained to hold, therefore, that the evidence does not support the findings of the jury or the judgment entered thereupon.

The words appearing on one of the notes above her signature indicating a pledging of her separate estate do not place such note in any better position, so far as the rights of the plaintiff are concerned, than the other notes which are without such declaration. *Ritter v. Bruss,* 116 Wis. 55. 58, 92 N. W. 361; *Bailey v. Fink,* 129 Wis. 373, 375, 109 N. W. 86.

We find no ground upon which any doctrine of estoppel could be successfully invoked against the appellant.

It follows that the motions of the appellant for a nonsuit or for a verdict in her favor should have been granted and the action dismissed as to her.

By the Court.—Judgment reversed.

STATE EX REL. DEMPSEY, Respondent, vs. WERRA ALUMINUM FOUNDRY COMPANY and others, Appellants.

March 8—April 5, 1921.

Corporations: Right of stockholder to inspect books: Motive: Mandamus to enforce right.

1. The common-law right of a stockholder of a corporation to inspect its books and records was a qualified right, and could be exercised only for a purpose not inimical to the interests of the corporation; but sec. 1757, Stats., requiring corporate books to be kept open for the inspection of stockholders, gives them an absolute and unconditional right of inspection, regardless of the motive which prompted it.
2. Such statutory right to inspect the books and records of a corporation can be enforced by *mandamus*, regardless of the motives of the stockholder, since judicial discretion should not be exercised to withhold *mandamus* to enforce a clear right conferred by statute when no other remedy is available. [Whether the stockholder could confer his personal right of inspection on a stranger who seeks information, not for the benefit of the stockholder but for the purpose of injuring the company, not decided.]
3. In an application for *mandamus* to compel a corporation to permit inspection of its books by a stockholder, the relator can allege, on information and belief, a demand for such inspection by his attorney in fact and the refusal thereof by the officers of the corporation, since those matters were not within his personal knowledge.
4. A proceeding by *mandamus* is essentially a civil action so far as the rules and practice as to pleadings are concerned.

APPEAL from a judgment of the circuit court for Waukesha county: MARTIN L. LUECK, Circuit Judge. *Affirmed.*

Relator is a stockholder of the appellant corporation. He was also the bookkeeper and treasurer thereof from sometime in 1913 until the 13th day of May, 1920, the date on which he resigned. On the 14th day of May he demanded, through Henry Lockney, his attorney in fact, an inspection of the books and records of said corporation.

which was refused. This is a *mandamus* proceeding brought to compel the corporation and its officers to permit the inspection demanded. A motion to quash the writ was denied by the circuit court. The corporation thereupon filed return to the writ in which, among other things, it was alleged that the purpose of the examination of its books and records was to get into the hands of the attorneys for the relator and others employed by him certain valuable information that can be delivered to the competitors of the respondent corporation with relator's said stock; that such action on relator's part would cause great and irreparable damage to the respondent corporation and to all of its stockholders other than the relator; that since this action was commenced the relator has made efforts to dispose of his stock in the *Werra Aluminum Foundry Company* to competitors of the said company; that the purpose of his attempt to dispose of his stock in said company to competitors of the respondent corporation is to secure for himself a price far in excess of the real value of the stock, because of the information which the competitor might secure as to the conduct of the business of the respondent corporation, and further to irreparably damage the said respondent corporation and its stockholders, other than himself, by allowing its competitors to secure information for their benefit as to the conduct of the business of the respondent corporation, to the detriment of said corporation and all of its stockholders other than relator.

The relator demurred to the return, and from a judgment sustaining the demurrer and directing the issuance of a peremptory writ of *mandamus* addressed to the appellant corporation and its principal officers commanding them to permit the inspection of the books and records as prayed for, the corporation and its officers bring this appeal.

For the appellants there was a brief by *Frame & Blackstone* of Waukesha, and oral argument by *A. L. Blackstone*.

For the respondent there was a brief by *Lockney & Lowry* of Waukesha, and oral argument by *J. K. Lowry.*

OWEN, J. Relator claims that he has an absolute right to an inspection of the books and records of the corporation by virtue of the provisions of sec. 1757, Stats., which provides as follows:

"The books of every corporation containing the stock subscriptions and accounts shall at all reasonable times be open to the inspection of the stockholders; and every creditor of a corporation shall be informed at any time of the amount of capital stock of such corporation subscribed, the amount paid in, who the stockholders are, the number of shares of stock owned by each and the amount unpaid by each stockholder upon the shares owned by him, and if any shares of stock, which were not fully paid for, have been transferred within six months of the time of inquiry, the name of the person who transferred the same and the amount due thereon at the date of such transfer. And the officers of such corporation shall furnish any such creditor correct information thereof. And any officer refusing, when requested so to do, shall be liable for any damage caused thereby."

Appellants contend that this statutory provision does not confer upon a stockholder of a corporation an absolute right to an inspection of the books and records thereof, but that the right is a conditional one and can be exercised only for a proper purpose; that the purpose for which relator desires the inspection is inimical to the best interests of the corporation, and that a court should not assist him in obtaining that right by the issuance of a writ of *mandamus,* which is a writ to be issued in the discretion of the court.

At common law a stockholder enjoyed the right of inspection of the books and records of a corporation for purposes not inimical to its interests. The right as it existed at common law was a qualified right, and courts did not issue writs of *mandamus* to secure such right where they disapproved of the motives prompting the demand

therefor. In most of the states this right has been declared by statutes similar to our sec. 1757. Whether this statutory right is absolute or conditional is a question upon which the decisions are not in accord. However, we think that the great weight of authority is to the effect that the statutory right is absolute, and that courts will not inquire into the motives of the stockholder who demands the inspection. See notes in 45 L. R. A. 446; 20 L. R. A. N. S. 185; 42 L. R. A. N. S. 332, and 107 Am. St. Rep. 674. Special attention is also called to *Kimball v. Dern,* 39 Utah, 181, 116 Pac. 28, where the authorities bearing upon the subject are exhaustively reviewed.

It is clear to us that the legislative purpose in enacting sec. 1757 was to afford a stockholder of a corporation an opportunity to fully inform himself with reference to the affairs of the corporation. This is in conformity with the self-evident principle that a person is entitled to full information concerning his individual business affairs. To deny him this right because, forsooth, it is feared that he may use the information to the disadvantage of the corporation is to say that one legitimately may be kept in ignorance of his own business affairs. In our judgment the purpose of the statute was to enlarge rather than merely declare the rights of stockholders as they existed in this respect at common law. This being a right conferred by statute as an integral part of the legislative scheme according to which corporations are permitted to exist, courts cannot withhold the writ of *mandamus* to enforce that right without thwarting the legislative will. Judicial discretion should not be exercised to withhold the writ of *mandamus* to enforce a clear right conferred by statute when no other remedy is available to secure such right. To do so amounts to judicial assumption of legislative prerogatives, emasculates or annuls legislative enactments, and savors of judicial government. In specifying the conditions of corporate

existence the legislature may provide that every person who invests his money in a corporate enterprise shall have access to the books and records of the corporation, and we regard it as the judicial function to enforce the legislative will without condition or qualification. We therefore hold that sec. 1757 secures to stockholders of a corporation the absolute right to inspect the corporate books and records and that *mandamus* will issue as a matter of course to enforce such right. An attempt on the part of the stockholder to make an unlawful use of such information is quite another matter. While his right to the information is absolute, it does not follow that he can make an unlawful use thereof. What would constitute an unlawful use is not here involved. The principle here decided is that he cannot be denied the information because of the motives which prompt him to seek the same.

It is to be noted that the inspection demanded in this case was not refused because some person other than the stockholder himself, acting as his attorney in fact, was to make the inspection. The right granted by the statute is a right personal to the stockholder, and while in many instances it is no doubt necessary that the stockholder act through an agent or attorney in fact who is competent to properly interpret the books and records, yet if the stockholder should attempt to confer this right on a stranger who seeks the information not for the benefit of the stockholder but for the purpose of injuring the corporation, such as a competitor in business of the corporation, another question would be presented, upon which we now express no opinion. The denial of the right of inspection is not sought to be justified in this case because Mr. Lockney was serving the interest of any one other than the relator.

The sufficiency of the petition is also challenged because the demand of relator's attorney in fact for an inspection of the books and records and the refusal thereof was alleged

upon information and belief. Of this the relator did not have personal knowledge and he could not make the allegation in any other form. We think the allegation was sufficient. "It has long been established in this state that a proceeding by *mandamus* is essentially a civil action so far as the rules and practice as to pleadings are concerned." *State ex rel. Milwaukee Co. v. Buech,* 171 Wis. 474, 177 N. W. 781. The judgment, therefore, should be affirmed.

By the Court.—Judgment affirmed.

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1. All reasonable presumptions are to be made in favor of the true owner of land, including the presumption that actual possession is subordinate to the right of the true owner, subject to the limitation that actual, continuous, exclusive possession for the statutory period, unexplained, creates a presumption of fact that such possession was characterized by all the requisites to establish title by adverse possession. *Perkins v. Perkins,* 421
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Trespass by cattle: Liability of owner: Partition fences: Wilful trespass.

1. Under sec. 1391, Stats., barring landowners who do not maintain partition fences from recovering for trespasses by animals of adjoining landowners, the obligation rested on the

plaintiff landowner, if he desired to recover damages for the straying of defendant's cattle from the latter's adjoining farm upon plaintiff's farm, to see to it that a proper partition fence was built; and it was therefore immaterial whether the proceedings of fence viewers to establish a partition fence were taken according to the statute or whether the blame for failure to have the fence completed should be placed upon plaintiff or defendant or both. *Schmudlach v. Danner,* 513

2. The common-law absolute liability of the owner of domestic cattle for damage done by his default in failing to so care for them that they do not stray from his lands to those of another is still the law of this state except as modified by statute. *Ibid.*

3. The provisions of sec. 1391, Stats., apply only to such trespasses as are occasioned by the natural propensity of the animals themselves, and not to a positive intentional act of the owner or keeper of such animals whereby the trespass is occasioned; and as to such wilful trespasses the absolute common-law liability of owners for trespasses by their cattle is still in force. *Ibid.*

4. To constitute wilful trespass as distinguished from the trespass contemplated by sec. 1391, Stats., there must be more than a mere turning of cattle loose from the owner's barnyard onto his own fields, even if he has reason to believe that if left to themselves they will probably wander into the unfenced field of his neighbor; and in an action for such a trespass on a clover field, where there was a gap in the partition fence, an instruction that there would be a wilful trespass if defendant "knew that his cattle had discovered the clover field and were certain to return if they were given the chance, to turn them out of his barnyard towards the gap and knowingly allow them to walk direct to the clover field," was too broad. *Ibid.*

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decision was filed, where the court ordered the record to be retained within sixty days after such decision was announced. *State ex rel. Hemmy v. Miller,* 412

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4. Where the defendant was awarded a new trial on condition that he pay the costs of the first trial, and on plaintiff's appeal the order was affirmed on a ground which would not require the defendant to pay costs, that part of the order relating to costs, not having been appealed from by the defendant, will not be disturbed. *Webb v. Call Pub. Co.* 45

5. On defendant's appeal from a judgment, plaintiff cannot complain of the order of the court requiring a remission of part of the damages awarded as a condition of denying defendant's motion for new trial, where plaintiff had accepted the provisions of the order, his remedy being to refuse to remit and to appeal from the order granting the new trial. *First Wisconsin Trust Co. v. Schmidt,* 477

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6. Exceptions will not be considered where rulings favorable to the appellant would not change the decision on the issues litigated, nor will they be considered where no grounds are stated, no propositions argued, and no principles of law discussed. *Wood v. Coleman,* 554

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7. Instructions which erroneously placed on one who had filed a claim against an estate a greater burden of proof than the law required were prejudicial. *Estate of Utter,* 180

8. Where the only matters in issue were the amount of damages and whether defendant's employee at the time of an accident was acting within the scope of his employment, and the undisputed facts showed as a matter of law that the employee was so acting, misconduct of plaintiff's counsel in attempting to show that defendant was insured will not be deemed prejudicial, the damages awarded not being excessive. *Smith v. Yellow Cab Co.* 33

9. Where the jury, notwithstanding misconduct by plaintiffs' counsel in attempting to show that defendant was insured, did not make an excessive award of damages to the wife, it will be presumed that the jury, in assessing the husband's damages, was not prejudiced. *Ibid.*

10. Where plaintiff had testified that he did not recall a conversation in which he stated that he desired defendant's political candidate to win, it was improper for the court to permit a question asking whether defendant did not state that he wanted to see the Socialists cleaned out, since the effect of that question was to prejudice plaintiff in the minds of any Socialists who might be on the jury. *Bradley v. Harper,* 103

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13. An order admitting a will to probate is affirmed notwithstanding one of the subscribing witnesses, testifying as to facts showing a proper execution of the will, admitted on cross-examination that he had made an affidavit before trial as to a different set of facts, where he testified there was a misunderstanding about the affidavit so presented to him and again reiterated his testimony, as the court evidently believed the witness and this court cannot say he was in error in his conclusion. *Estate of Goodyear,* 363

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14. Under sec. 3049*a*, Stats., giving to a respondent a right to a review of rulings of which he complains on giving due notice stating in what respect he asks for a review, reversal, or modification of the judgment or order appealed from, he is as to such part of the judgment or order an appellant, and under Rule 32 of this court is entitled in the discretion of this court, on his appearing and the original appellant not appearing, to have such part of the judgment or order reversed as of course upon the merits and without argument. *Dempsey v. National Surety Co.* 296

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15. Where the justices of the supreme court are equally divided in opinion on the question involved on an appeal, the judgment or order appealed from will be affirmed. *Johnston v. West Allis,* 463; *Will of Saveland,* 328; *Racine Auto Tire Co. v. Hansen,* 118; *Application of Gruhl Sash & Door Co.* 215

Same: Remanding case: Motions not passed on.

16. Where the trial court changed certain answers in a special verdict without passing on a motion for a new trial, the supreme court, on reinstating the answers of the jury, will remand the case with instructions to pass on a motion for a new trial. *Moody v. Milwaukee E. R. & L. Co.* 65

Appeal from county courts. See EXECUTORS, 4. SPENDTHRIFTS, 3.

Appeal from juvenile courts. See INFANTS, 1.
Appeal from civil court of Milwaukee county. See COURTS, 6.
ARCHITECTS. See EVIDENCE, 1. TRIAL, 2–4.

ASSAULT AND BATTERY.

See DAMAGES, 1, 2. TRIAL, 9, 10.

Interrupting religious services: Removal of disturber: Degree of force used.

1. In an action by a church organist against the pastor of a church and others for injuries sustained by his wife when she was removed from the organ loft after he had been discharged from his employment, he and his wife refusing to leave the church on demand of the pastor until he was paid what was owing to him, the question whether he and his wife on the occasion in question were guilty of molesting and interrupting a religious service when they declined to leave the organ loft of the church on request of the pastor is for the jury. *Ogodziski v. Gara,* 371
2. The evidence showing the manner of the removal of the wife from the organ loft when she and her husband refused to leave not harmonizing, and the alleged injuries the treatment is claimed to have caused her permitting of different inferences, the question whether or not defendants used excessive force in evicting her from the organ loft is for the jury. *Ibid.*
3. Where plaintiff charged an assault and the excessive use of force in the removal of his wife, and defendants contended that what they did was lawful and that they used no more force than was necessary, instructions placing the burden of proof on defendants to show that they used only reasonable force, instead of on plaintiff to show that they used unreasonable force, are erroneous and prejudicial. *Ibid.*

Evidence: Doctor prescribing for plaintiff: Competency.

4. Where a doctor visited the wife at the request of attorneys and prescribed for her, he could testify that he took the history of her ailment that she gave him into consideration but could not testify to the facts she so stated, except as to facts describing the existence of pain. *Ogodziski v. Gara,* 371

Same: Communications of pastor to parishioners: Competency.

5. Communications sent by the defendant pastor to the wife, apparently pertaining to matters concerning the relationship of plaintiff and his wife as parishioners, organist, and members of the choir, were incompetent; and this court seriously questions whether the court's instruction to the jury that such evidence was improperly received and that they must disregard it cured the error in admitting it. *Ogodziski v. Gara,* 371

Assault with intent to do great bodily harm: Degrees of assault.

6. Under sec. 4377, Stats., an assault with intent to do great bodily harm is the same whether committed in a heat of

passion or in a cool, deliberate state of mind. *Mainville v. State,* 12

7. In a prosecution for assault it was sufficient for the court to submit as possible verdicts, assault being armed with a dangerous weapon with intent to kill, under sec. 4376, Stats.; assault evincing a depraved mind regardless of human life, under sec. 4374*a;* assault with intent to do great bodily harm, under sec. 4377; assault without any felonious intent, under sec. 4696; and not guilty, where he correctly instructed the jury as to an assault and charged that if the intent to do great bodily harm was lacking they could find simple assault. *Ibid.*

ASSESSORS. See TAXATION.

ASSIGNMENTS.

See BILLS AND NOTES, 3. BROKERS, 3. CORPORATIONS, 5. MORTGAGES, 4.

Cause of action for deceit: Assignability.

The test of the assignability of an action in tort is whether the action would survive; and an action for deceit does not come within the class designated by the statute. *Samuel Meyers, Inc. v. Ogden Shoe Co.* 317

ATTORNEYS. See TRIAL, 6, 7, 12.

ATTRACTIVE NUISANCES. See RAILROADS, 5.

AUTOMOBILES.

See APPEAL, 11. INSURANCE, 4, 5, 10. NEGLIGENCE. STREET RAILWAYS, 5–9. TRIAL, 8. WORKMEN'S COMPENSATION, 8.

Negligence: Persons liable: Son driving father's automobile.

1. Where the evidence in an action for injuries sustained by the plaintiff by being run over by an automobile showed that the automobile journey during which the accident occurred was to make a social visit for which one of the defendants, who was driving the car, alone had received an invitation, and that he had invited his father and brother, who were the other defendants, to ride with him, it is *held* that the father and brother were guests in the automobile, even though it was owned by the father, and that the driver alone is liable for injuries to third persons caused by his negligence. *Reiter v. Grober,* 493

Same: Imputed negligence.

2. The negligence of the driver of a private vehicle is not imputed to an occupant who has no control over the driver, is not engaged in a joint undertaking with him, is guilty of no negligence himself, and stands in no other relation to the driver requiring the negligence of the latter to be imputed to the occupant. *Reiter v. Grober,* 493

3. The doctrine of *Prideaux v. Mineral Point,* 43 Wis. 513, in so far as it imputes the negligence of the driver of a private

vehicle to an occupant therein, although steadily adhered to since its announcement, is not a rule of property so as to make applicable the rule of *stare decisis;* and in the interests of justice and to conform to the overwhelming weight of authority it is expressly overruled. *Ibid.*

Same: Collisions at street intersections: Law of the road: Contributory negligence.

4. An automobile driver who, in making a turn, cut a corner, in violation of sub. 1, sec. 1636—49*b*, Stats., was guilty of negligence *per se*. *Foster v. Bauer,* 231

5. The evidence in this case is *held* to show that the driver's negligence in cutting a corner so contributed to the collision between his car and plaintiff's motorcycle that he can recover nothing on his counterclaim against plaintiff. *Ibid.*

6. The plaintiff, a deputy sheriff, was negligent where at the time of the accident he was running his motorcycle at a speed of twenty or twenty-two miles an hour, sec. 1636—49, Stats., prescribing a maximum speed of fifteen miles an hour. *Ibid.*

7. A finding of the trial court that plaintiff struck defendant's automobile as it rounded a corner, that he would have struck the automobile had he been going at a lawful speed, and that his rate of speed was not the proximate cause of the collision, is against the clear preponderance of the evidence, where plaintiff testified that he could have stopped his motorcycle within twenty feet had he been going fifteen miles per hour and that he was twenty to twenty-five feet from defendant when the latter started to turn. *Ibid.*

8. A truck driver who crossed to the opposite side of the street on approaching a street intersection in order to cut the corner in turning into the intersecting street was guilty of a palpable violation of the law of the road. *Groeschner v. John Gund Brewing Co.* 366

9. In an action for the death of a motorcycle driver in a collision with a truck being driven on the wrong side of the street, the question of the contributory negligence of the driver of the motorcycle is for the jury. *Ibid.*

10. Whether the verdict of a coroner's jury is admissible for any purpose in an action for damages—a proposition generally negatived by the authorities,—it was immaterial and inadmissible under the issues in this case. *Ibid.*

11. A boy nine and a half years of age, possessing the capacity and discretion of boys of his age generally, was guilty of contributory negligence as a matter of law in colliding with defendant's automobile at a street intersection, where the evidence disclosed he was coasting down a hill face downward on his sled, without observing whether or not his course was clear, he having testified that he could guide his sled to either side of his course. *Goldberg v. Berkowitz.* 603

AWARD of industrial commission. See WORKMEN'S COMPENSATION.

BAILMENT.

See EVIDENCE, 5.

Nature of contract: Implied agreements.

1. In order to constitute a bailment there must be an express or implied agreement to redeliver the property when the purpose of the bailment has been fulfilled. *Bradley v. Harper,* 103

2. An instruction that the burden was on plaintiff to satisfy the jury that the defendant agreed to return radiators loaned to him was erroneous as requiring plaintiff to prove an express agreement to return, where the evidence tended to show facts from which an agreement to return would be implied. *Ibid.*

BANKS AND BANKING.

Consolidation of trust company banks: Securities deposited with state treasurer.

Under sec. 2024—*77rr*, Stats., in spite of seeming conflict arising from the broad terms used, on the consolidation of two trust company banks the new corporation takes the place of the old companies, and, succeeding to their assets and assuming their liabilities, succeeds to the ownership of the securities deposited by them under sec. 2024—*77j* with the state treasurer, and need not deposit additional securities, but may withdraw from those theretofore deposited all exceeding the maximum $100,000 deposit required of such a company however large its capital. *First Wis. Trust Co. v. Johnson,* 564

BATTERY. See ASSAULT AND BATTERY.

BEQUESTS. See WILLS.

BILLS AND NOTES.

See HUSBAND AND WIFE. MECHANICS' LIENS, 1. MORTGAGES. TRIAL, 14, 15. WAREHOUSEMEN.

Consideration.

1. A *bona fide* settlement of a breach of marriage promise is a valid consideration for a note. *Westenberg v. Bhend,* 137

Holder in due course: Instrument acquired after maturity.

2. A note of $800, given as the initial payment on a land contract, was deposited with the plaintiff to secure a $2,000 note of the vendor, and after the $800 note became due a new note of $2,500 executed by a third person was given to the plaintiff and the $800 note redeposited. *Held,* that the finding of the court that the $2,000 note was paid by the $2,500 note and that the title to the $800 note was acquired by its redeposit after it was due, is sustained by the evidence. *First Nat. Bank v. Reed,* 499

Same: Proof of acquisition before maturity.

3. In an action on notes given for the price of a dredge, brought by the assignees of the seller, in which the buyer proved that

the purchase had been induced by fraudulent representations, the assignees, having procured the notes from the seller, whose title was defective under sec. 1676—25, Stats. 1915, had the burden of proving, under sec. 1676—29, that they acquired the notes in due course for value under sec. 1675—51; and in sustaining such burden they were required to prove that they acquired the notes before they became due under sec. 1676—15. *Jones v. Brandt,* 539

4. Sec. 1676—15, Stats. 1915, providing that unless an indorsement is dated after maturity every negotiation of an instrument is deemed *prima facie* to have been effected before maturity, does not relieve the holder of a note taken from a person whose title is defective from the burden of affirmatively establishing that the note was indorsed and delivered before it was due. *Ibid.*

BREACH.

Of contract. See CONTRACTS. SALES, 10, 11.

Of marriage promise. See BILLS AND NOTES, 1. TRIAL, 14, 15.

BROKERS.

See FACTORS.

Who are: Communicating offer to landowner.

1. Where a real-estate broker was offered $11,500 "for the farm of M.," and thereupon telegraphed M. that he had succeeded in interesting a client in the land who offered $9,000, and received a reply from M. directing him to accept the offer, the transaction was one in which the broker was acting as an agent and not one in which as a principal he was buying property from M. to sell to the purchaser. *Helmholz v. Greene,* 306

Compensation: When earned.

2. In order to entitle a broker to recover his commission he must establish that he had produced a purchaser who was able, ready, and willing to purchase the property on the terms specified by the owner. *Weller v. Phillip Gross R. Co.* 447

3. Where brokers were employed to sell a ninety-nine-year leasehold on terms stated in writing, which included conditions to conform to the present lease and to release the vendor from all liability and for the erection of a new building by the lessee, pending which a bond was to be deposited, an offer to purchase by the broker's customer which contemplated no assignment of the lease until the new building was completed, and which required the vendor to remain the principal on all bonds, did not conform to the stated terms so as to entitle the brokers to their commission. *Ibid.*

4. Brokers have earned their commission when the stated terms are accepted by their customer and the contract is closed; but they are not entitled to the commision where the stated terms were not accepted and the parties never agreed on other terms. *Ibid.*

[5. Whether the unauthorized acceptance in writing by the brokers of an offer which was not in conformity to the owners' terms is such a palpable breach of duty towards the owners as to preclude a recovery by the brokers, not decided.] *Ibid.*

Same: Statements by owner before deal closed: Estoppel.

6. The owners' statement to brokers that the latter had earned their commission, made when the owners believed a deal would be closed with the brokers' customer, expressed no intention by the owners to relinquish their right to resist payment of the commission if the customer was not willing to take the property under the terms stated to the brokers, and therefore did not waive that right. *Weller v. Phillip Gross R. Co.* 447

7. The statement made by the owners to the brokers while negotiations with the brokers' customer were still pending, that the brokers had earned their commission, does not estop the owners from resisting payment of the commission after the negotiations fell through, in the absence of a showing of any acts by the brokers in reliance on the statement. *Ibid.*

BURDEN OF PROOF. See APPEAL, 7. BAILMENT, 2. BILLS AND NOTES, 3. EXCHANGE OF PROPERTY, 1, 2. NEGLIGENCE, 7. SALES, 8. TRIAL, 17. WORKMEN'S COMPENSATION, 11.

BY-LAWS. See INSURANCE, 11, 12, 16.

CARRIERS.

See FEDERAL EMPLOYERS' LIABILITY. RAILROADS. STREET RAILWAYS.

Regulation: Ordinance prohibiting diverting of cars: Emergency: Control by railroad commission.

1. An ordinance of the city of Milwaukee prohibiting a street car on which there were passengers from being diverted from the usual course on the line for which it was designated, unless it is disabled or an emergency renders it impossible to proceed in the usual course, was only intended to prevent arbitrary changes in the running of street cars whereby passengers might be compelled to abandon them before they reached their scheduled destination. *Milwaukee v. Becker,* 169

2. Where a street car running on a seven-minute headway was detained nine minutes at a railroad crossing and was overtaken at this point by the following car, there was an emergency preventing the car from proceeding in the usual course, so that a motorman was not guilty of violating such ordinance by turning the car around at the first opportunity after crossing a railroad track, though it had not yet reached the end of its scheduled run; and it makes no substantial difference whether the motorman began his change of route on one side of the railroad track or the other. *Ibid.*

3. In this case it is not necessary to decide whether the exclusive control over such matters of service as are covered by the ordinance is now vested in the railroad commission, or whether

the orders of the engineer of the commission stationed at Milwaukee are effectual. *Ibid.*

Carriage of freight: Lien.

4. In an action against the consignee of an interstate lumber shipment to recover the freight charges thereon, the fact that the railway company's agent negligently delivered an expense bill showing all freight charges prepaid, whereupon the consignee paid the consignor the full contract price, though the lumber was to be delivered at destination f. o. b., is no defense, the interstate commerce act (U. S. Comp. Stat. 1918, § 8565) forbidding common carriers from giving any preference or advantage to any person or subjecting any person to any undue or unreasonable prejudice or disadvantage. To hold that the railway company, by reason of estoppel, might be prevented from collecting the freight due, would violate the rule of public policy thus prescribed. *Chicago & N. W. R. Co. v. J. I. Case Plow Works,* 237

Carriage of passengers: Negligence: Breaking of window in car.

5. A presumption of negligence is indulged in cases where the facts and circumstances show that an accident could not have happened if the defendant had used ordinary care; but in this case, which is to recover damages for injuries received by a passenger on an interurban car when a window suddenly broke, this doctrine does not apply, because the evidence does not sustain the conclusion that the breaking of the window was caused by defendant's negligence in furnishing a defective window, rather than some unknown cause, such as the window being struck by an object from the outside. *Sommerfeld v. Chicago, N. S. & M. R. R.* 191

6. Where under the evidence it was a matter of speculation and conjecture as to whether the window was broken by a stone thrown at the train or as the result of the negligence of the railroad company in furnishing defective window glass or an imperfect frame, or in negligently fitting the glass into the sash, the passenger could not recover, the doctrine of *res ipsa loquitur* being inapplicable. *Ibid.*

CATTLE-GUARDS. See RAILROADS, 4.

CHATTEL MORTGAGES.

Sale: Retaking of goods: Consent of mortgagor: Penalty.

Where the mortgagor consented to the sale of mortgaged property under a chattel mortgage, he could not recover a penalty under sec. 2316*c*, Stats. 1915, on the ground that the statute relating to chattel-mortgage sales had not been complied with, the taking not being hostile to him. *Jones v. Brandt,* 539

CHILDREN. See AUTOMOBILES, 11. INFANTS. NEGLIGENCE, 10, 11. RAILROADS, 3–5.

CIRCUIT COURT. See COURTS, 1.

CIRCUMSTANTIAL EVIDENCE. See CRIMINAL LAW, 14.

CITIES. See MUNICIPAL CORPORATIONS.

CIVIL COURT OF MILWAUKEE COUNTY. See COURTS, 4–6.
CLAIMS against decedents. See EXECUTORS.
COMMERCIAL PAPER. See BILLS AND NOTES.
COMMISSION. See BROKERS, 2–6.
COMMISSIONER OF PUBLIC WORKS. See MUNICIPAL CORPORATIONS, 2.
COMMON COUNCIL. See MUNICIPAL CORPORATIONS, 1, 2, 4.
COMPETITIVE BIDDING. See MUNICIPAL CORPORATIONS, 3.
COMPLAINT. See FRAUD, 1, 2. FRAUDS, STATUTE OF, 9. INSURANCE, 1, 2. PLEADING.
CONDEMNATION. See EMINENT DOMAIN. MUNICIPAL CORPORATIONS, 7.
CONDITIONAL DEVISE. See WILLS, 9.
CONSIDERATION. See BILLS AND NOTES, 1. DEEDS, 4. LANDLORD AND TENANT, 2. MORTGAGES, 1, 2. PUBLIC UTILITIES, 1, 4. TRIAL, 14, 15. VENDOR AND PURCHASER, 3.
CONSOLIDATION of trust company banks. See BANKS.
CONSPIRACY. See FRAUD, 1–3.
CONSTITUTIONAL LAW. See APPEAL, 1. DETECTIVES. INJUNCTION. MASTER AND SERVANT, 2. PUBLIC UTILITIES, 8.
Former jeopardy. See CRIMINAL LAW, 4–12.
Liberty of the person. See SPENDTHRIFTS, 2.
Trial by jury. See JURY.
CONSTRUCTION.
Of contracts. See CONTRACTS.
Of deeds. See DEEDS, 6.
Of wills. See COURTS, 3. WILLS, 2–14.
CONSTRUCTIVE CONTRACTS. See CONTRACTS, 4.
CONSTRUCTIVE EVICTION. See LANDLORD AND TENANT, 9, 10.
CONSTRUCTIVE POSSESSION. See TAXATION, 4. 5.
CONTINUANCE. See CRIMINAL LAW, 2, 3.
CONTINUING TRESPASS. See MUNICIPAL CORPORATIONS, 8, 9.

CONTRACTS.

See ACCORD. BAILMENT. BILLS AND NOTES. EXCHANGE OF PROPERTY. FRAUD, 5. LOGS AND LOGGING. POSTOFFICE. PUBLIC UTILITIES, 1. TAXATION, 3.

Formation. See VENDOR AND PURCHASER.
Consideration. See BILLS AND NOTES, 1. DEEDS, 4. LANDLORD AND TENANT, 2. MORTGAGES, 1, 2. PUBLIC UTILITIES, 1, 4. TRIAL, 14, 15. VENDOR AND PURCHASER, 3.
Validity. See FRAUD, 5. FRAUDS, STATUTE OF. HUSBAND AND WIFE. MORTGAGES, 2. PUBLIC UTILITIES, 1–3. VENDOR AND PURCHASER, 2, 4.
Construction. See CUSTOMS, 5. DEEDS. HUSBAND AND WIFE, 3. INSURANCE, 3–7. LANDLORD AND TENANT, 1–3. LOGS AND LOGGING, 1. MECHANICS' LIENS, 1. SALES. TRIAL, 2. VENDOR AND PURCHASER.

Value of services: Contract price: When evidence of reasonable value competent.

1. To render evidence of the value of services admissible on an issue as to the contract price for such services, there must be a direct conflict as to the contract price, and the difference must be so great that the reasonable value thereof from the standpoint of the parties when the contract was made may reasonably discredit the evidence on one side and corroborate that on the other. *Kunitz v. Ruske,* 639

2. Where plaintiff claimed defendant agreed to pay $500 for plastering and $375 for doing the stucco work on his house, while defendant claimed plaintiff was to do the whole work for $500, there was such a direct conflict and such a difference in the amounts claimed as warranted the court in admitting evidence of the reasonable value of doing the work and furnishing the materials. *Ibid.*

3. On an issue as to the agreed price of doing certain work, evidence as to the actual cost is incompetent; but where there was evidence that the reasonable value of the work and materials was from $900 to $950, the erroneous admission of evidence that the actual cost of the work was $924 was not prejudicial. *Ibid.*

Quasi-contracts: Nature.

4. A *quasi* or constructive contract rests upon the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another, and is not in fact a contract, but an obligation which the law creates in the absence of any agreement, when and because the acts of the parties or others have placed in the possession of one person money, or its equivalent, under such circumstances that in equity and good conscience he ought not to retain it. *Grossbier v. Chicago, St. P., M. & O. R. Co.* 503

Mutuality. See LANDLORD AND TENANT, 2.

Single or separate contracts. See SALES, 4.

Particular forms of contracts.

Of brokerage. See BROKERS.
Of insurance. See INSURANCE.
Of sale. See SALES. VENDOR AND PURCHASER.
With married women. See HUSBAND AND WIFE.
With municipalities. See MUNICIPAL CORPORATIONS, 3, 4.
With promoters of corporation. See CORPORATIONS, 5–7.

Rescission of contract. See SALES, 10.

CONTRIBUTION. See SUBROGATION.

CONTRIBUTORY NEGLIGENCE. See APPEAL, 11. AUTOMOBILES, 2, 3, 5–7, 9, 11. NEGLIGENCE. RAILROADS, 2–4. STREET RAILWAYS, 5–10.

CONVEYANCES. See DEEDS. MORTGAGES.

CORONERS. See AUTOMOBILES, 10.
CORPORATE STOCK. See FRAUDS, STATUTE OF, 6.

CORPORATIONS.

See FRAUDS, STATUTE OF, 6. INSURANCE. MASTER AND SERVANT, 1.

Right of stockholder to examine corporate records: Enforcement. See MANDAMUS, 2.

1. The common-law right of a stockholder of a corporation to inspect its books and records was a qualified right, and could be exercised only for a purpose not inimical to the interests of the corporation; but sec. 1757, Stats., requiring corporate books to be kept open for the inspection of stockholders, gives them an absolute and unconditional right of inspection, regardless of the motive which prompted it. *State ex rel. Dempsey v. Werra A. F. Co.* 651
2. Such statutory right to inspect the books and records of a corporation can be enforced by *mandamus*, regardless of the motives of the stockholder, since judicial discretion should not be exercised to withhold *mandamus* to enforce a clear right conferred by statute when no other remedy is available. [Whether the stockholder could confer his personal right of inspection on a stranger who seeks information, not for the benefit of the stockholder but for the purpose of injuring the company, not decided.] *Ibid.*

Meetings of stockholders: Proxies: Failure to affix documentary stamps.

3. Although the federal revenue act of 1919 (U. S. Comp. Stats. Ann. Supp. 1919, § 6318*n*) provides for the retention in force of all laws relating to the assessment and collection of taxes, so far as applicable, the act of Congress of June 13, 1898, making certain unstamped instruments, including voting proxies, invalid, did not become a part of the revenue act of 1919 so as to forbid the voting of an unstamped proxy at a corporate election, since in the passage of the revenue act of 1914 these sections were incorporated in the bill passed by the House of Representatives but were eliminated by the Senate. *State ex rel. Hemmy v. Miller,* 412
4. The presiding officers and inspectors of a corporate election were not justified in rejecting unstamped voting proxies on the ground that the reception of such ballots would subject them to a penalty under the revenue act of 1919 (U. S. Comp. Stats. Ann. Supp. 1919, § 6318*k*), providing that whoever "accepts" any instrument, document, or paper without the full amount of tax thereon be duly paid is guilty of a misdemeanor and subject to a fine. *Ibid.*

Contracts with promoters: Adoption by corporation.

5. A valid agreement with promoters for the benefit of a corporation to be organized need not necessarily be assigned to the corporation, since the latter may adopt the contract if within

its powers and enjoy its benefits and assume its liabilities. *Samuel Meyers, Inc. v. Ogden Shoe Co.* 317

6. Defendant, sued for false representations made to the promoters of the plaintiff corporation in negotiations with defendant for a lease, is not estopped to deny the existence of plaintiff as a *de facto* corporation, it not being such a corporation at the time the representations were made. *Ibid.*

7. A lessee corporation cannot be held to have adopted an agreement made with its promoters for the lease of rooms served with alternating electric current when its officers, with full knowledge that such current was no longer furnished, executed a lease making no provision for such current or its continuance, but must be held to have waived the claim so that it could not sue the lessor on the theory that it had adopted such agreement and was entitled to its benefits. *Ibid.*

Banking corporations. See BANKS.

Municipal corporations. See MUNICIPAL CORPORATIONS.

Taxation of corporations. See TAXATION, 2, 3.

COSTS. See APPEAL, 4. COURTS, 5. TRIAL, 3.

COTENANTS. See ADVERSE POSSESSION, 5. TENANCY IN COMMON.

COUNTERCLAIM. See AUTOMOBILES, 5. MORTGAGES, 1. SALES, 5.

COURTS.

See DETECTIVES. INFANTS. JUDGES. PUBLIC UTILITIES, 6. TAXATION, 1. TRIAL.

Circuit courts: Jurisdiction in probate matters: Exercise.

1. Although the circuit court has concurrent jurisdiction with the county court as to matters involving the estates of decedents, the circuit court is as much bound to refuse to assume jurisdiction when lack of power to grant adequate relief in the county court is not clearly shown as though there were an absence of jurisdiction in the circuit court. *Pietraszwicz v. Pietraszwicz,* 523

2. Where petition had been made in the county court for probate of decedent's will which left all his property to his wife, the circuit court is without jurisdiction to enjoin, at the suit of the other heirs at law of decedent alleging the invalidity of the will, the widow's sale of the personal property, as plaintiffs had an adequate remedy by applying to the county court for appointment of a special administrator under sec. 3810, Stats., who would have power to collect the assets of the estate under sec. 3811. *Ibid.*

3. The special jurisdiction of county courts for the construction of wills in pending probate proceedings does not supersede or suspend the jurisdiction of the circuit court to construe such wills when all the parties are before it. *Giblin v. Giblin,* 632

Same: Power to correct clerical mistake in judgment.

4. By mistake a judgment in an action in the civil court of Milwaukee county was entered against the N. company instead of the M. company. The N. company appealed to the circuit court. The M. company was brought in on an order to show cause, and the action was dismissed as to the N. company and affirmed as to the M. company. *Held* that, there being no prejudice to the M. company, the circuit court properly corrected the judgment instead of remanding the case for that purpose. *Kausch v. Chicago & M. E. R. Co.* 220

5. Where costs were ordered for respondent in the civil court of Milwaukee county and taxed in the usual manner, but through the inadvertence of the clerk of the court the amount was not inserted in the judgment as directed by sec. 2927, Stats., and the circuit court ordered and entered costs taxed in the civil court, no motion being made to review the taxation in either court, *held*, that the circuit court had jurisdiction to remedy the error. *Samuel Meyers, Inc. v. Ogden Shoe Co.* 317

Civil court of Milwaukee county: Weight to be accorded findings.

6. Findings of the civil court of Milwaukee county have the same status on appeal to the circuit court as findings of the circuit court on appeal to the supreme court. They are not entitled to the conclusiveness of the verdict of a jury, but are controlling unless against the clear preponderance of the evidence. *Foster v. Bauer,* 231

Supreme court. See APPEAL.

County courts. See DESCENT. EXECUTORS. SPENDTHRIFTS. WORKMEN'S COMPENSATION, 9.

Review of award of industrial commission. See WORKMEN'S COMPENSATION, 17, 18.

COVENANTS. See SPECIFIC PERFORMANCE.

CRIMINAL LAW.

See ASSAULT, 6, 7. INFANTS, 2, 3. INJUNCTION. JURY, 2, 3.

Absence of defendant when jury drawn.

1. Where counsel for defendant had full opportunity to examine each juror and availed himself of such opportunity when the trial was entered upon, his absence at the time when names were struck by defendant from the jury list, under sec. 42, ch. 303, Laws 1913, was not prejudicial to defendant. *Mainville v. State,* 12

Continuance: Absence of defendant's counsel: Discretion of court.

2. The refusal of the trial court to grant a continuance on the ground that defendant's counsel was busy trying a case in another court was not prejudicial to defendant, where another member of the firm of which such counsel was a member, or a lawyer employed by it, was present and ably defended accused. *Mainville v. State,* 12

3. Judicial action on an application for a continuance is a matter resting largely in the sound discretion of the trial court, and its refusal to grant it will not be interfered with unless resulting in manifest prejudice to the party asking it. *Ibid.*

Former jeopardy: When jeopardy attaches: Waiver.

4. When a person has been placed on trial on a valid indictment or information before a court of competent jurisdiction, has been arraigned and has pleaded, and a jury has been impaneled and sworn, the general rule is that jeopardy has attached. *State v. B——,* 608

5. Under sec. 4645*a*, Stats. (providing that special pleas in bar may be entertained in the discretion of the court on the application of a defendant after the jury is impaneled, but that the application shall constitute a waiver of any jeopardy that has attached), a defendant, who after a jury was impaneled renewed a plea in bar, and after the court had required the state to answer or demur to the plea and overruled defendant's demand that the case be tried by the court introduced evidence in support of the plea and a verdict was returned sustaining it, waived any jeopardy that had theretofore attached. *Ibid.*

6. Under sec. 4724*a*, authorizing the state to bring a writ of error from any order or judgment sustaining a special plea in bar made or rendered before jeopardy attached, the state may bring a writ of error though jeopardy had attached, where it was waived by defendant under sec. 4645*a*, as sec. 4645*a* (Laws 1911, ch. 187) and sec. 4724*a*, Stats., as amended by said ch. 187, relate to the same subject matter and should be read and construed together. *Ibid.*

Same: Inconsistent offenses: Withdrawal of one: Effect.

7. Where defendant was charged with rape and adultery and the court instructed the jury that he could not be found guilty of both offenses, in effect withdrawing the charge of adultery if he was found guilty of rape, he was in jeopardy as to the charge of adultery and could not be again tried therefor unless he had waived such jeopardy. *State v. B——.* 608

Same: Waiver by appeal: Extent.

8. By applying for a new trial and by suing out a writ of error pursuant to which judgment was reversed, defendant waived any jeopardy which might theretofore have attached as to the crime of which he was convicted and lesser included offenses. *State v. B——,* 608

9. When a defendant has been once tried and a judgment of acquittal or conviction has been rendered, he has an absolute constitutional right to stand on the judgment as a bar to further prosecution for the same offense; but when he seeks to obtain a new trial, the extent of his waiver of the jeopardy theretofore attaching is a matter for legislative regulation not within the protection of the constitutional guaranty. *Ibid.*

10. Under sec. 21, art. I, Const., providing that writs of error shall issue in criminal cases as a matter of course, sec. 4719, Stats.,

authorizing new trials, and sec. 4724*a*, providing that where defendant prosecutes a writ of error the state may take a writ of error from the order or judgment of conviction upon a record containing rulings adverse to the state, where defendant brings a writ of error he waives the jeopardy which has theretofore attached so far as is necessary to give the state an effective review of other questions arising upon the same trial. *Ibid.*

11. If on review of the case sought by the accused the trial court's determination is affirmed, there can be no further inquiry, as the judgment of conviction, under the doctrine of implied acquittal, prevents a retrial as to other offenses charged. *Ibid.*

12. Under sec. 4724*a*, Stats., as amended by ch. 187, Laws 1911, where defendant was charged with adultery and rape and convicted of rape and sued out a writ of error on which the judgment was reversed, and the state sued out no writ of error, defendant did not waive the jeopardy as to the charge of adultery and could not be retried for that offense, adultery being a distinct offense and not a lesser offense included in that of rape. *Ibid.*

Review: Sufficiency of evidence.

13. Where there was evidence which, if believed, would support a conviction, and the trial court sustained the finding of the jury, this court cannot say that the jury erred in believing the evidence, and a conviction will not be set aside. *Fink v. State,* 264

Same: Inapplicable instructions: Nonprejudicial error.

14. Though the evidence as to an offense was principally direct, the giving of an instruction which was correct as to the law where the evidence was wholly circumstantial was not prejudicial to the defendant, the charge as a whole being as favorable to him as the facts warranted, and the instruction also correctly stating the rule applicable where there is direct evidence of the offense. *Fink v. State,* 264

Specific offenses.

Adultery. See ADULTERY. CRIMINAL LAW, 7, 12.
Assault with intent to do great bodily harm. See ASSAULT, 6.
Assault with intent to kill. See ASSAULT, 7.
Assault regardless of human life. See ASSAULT, 7.
Assault without intent. See ASSAULT, 7.
Failure to affix revenue stamps. See CORPORATIONS, 4.
Rape. See CRIMINAL LAW, 7, 12.

CROSS-COMPLAINT. See SUBROGATION, 5.

CUSTOMS AND USAGES.

See LOGS AND LOGGING.

When admissible: Existing customs: Logging contracts.

1. Custom cannot be proved to modify or contradict the terms of a written agreement (*Clarke v. Maisch,* 171 Wis. 225, followed); but where the terms of the contract were ambiguous,

evidence as to custom or usage was admissible in order to determine whether the logger was required to sort logs, where it was not expressly stated in the contract. *Dieck v. Oconto Co.* 156

2. In an action to recover the value of extra services rendered in connection with the contract, where there was no express provision as to sorting the logs and the evidence showed a custom that such work was not required unless specified, it was proper to submit to the jury the question whether the contract required plaintiff to sort the logs. *Ibid.*

3. To render evidence of a custom admissible to aid in construing an ambiguous contract it must be shown that the custom existed prior to the making of the contract; and a custom originating subsequent thereto cannot be considered in construing it. *Ibid.*

4. Error in admitting proof of a custom in the logging industry in the year subsequent to the execution of a contract does not require a reversal, since the court can indulge the special presumption that the custom was not of recent origin but was coincident with the growth of the industry, in which similar contracts were common. *Ibid.*

5. A logging contract requiring the contractor to deliver on cars, without specifying who should furnish the cars, is so ambiguous as to render admissible evidence of a custom of the owner of the logs to furnish them, though in the absence of evidence of such custom the contract will be construed to require the contractor to furnish the cars. *John O'Brien L. Co. v. Wilkinson,* 117 Wis. 468, distinguished. *Ibid.*

DAMAGES.

See DEATH. FRAUD, 3. INTEREST. LIBEL AND SLANDER, 7–10. SALES, 7. TRESPASS. TRIAL, 9, 10.

Punitory damages: Joint defendants.

1. In an action to enforce a joint liability for assault against two or more defendants, testimony as to the wealth of one is inadmissible as affecting the amount of punitory damages assessed against all. *Ogodziski v. Gara,* 380

2. Where two or more defendants are sued jointly for punitive damages arising out of a tort, evidence as to the wealth of the defendants is not competent. *McAllister v. Kimberly-Clark Co.* 169 Wis. 473, followed. *Ogodziski v. Gara,* 371

Damages enhanced by negligence of physician. See PHYSICIANS.

3. Where plaintiff sustained a fracture of her wrist because of the negligence of the defendant railway company, she may recover her entire damages from such defendant even though they may have been caused in part by the negligent treatment administered by a physician employed by her. *Fisher v. Milwaukee E. R. & L. Co.* 57

DAMS. See DEEDS, 7.

DEATH.

See INSURANCE, 6–9. INTERPLEADER. JUDGES. TRIAL, 5. WILLS, 10.

Damages to daughters by death of mother: Elements.

1. In an action for the death of a widow who left two daughters, one a minor, the evidence is *held* sufficient to support a judgment for $1,500 as damages, though there was but slight evidence showing financial contributions by deceased to her children. *First Wisconsin Trust Co. v. Schmidt,* 477

2. Damages may be allowed for the loss of the training, care, and education which the daughters could expect from their mother, and for which they would pay if they procured them from another, though there can be no recovery for loss of society. *Ibid.*

DEBTOR AND CREDITOR. See BAILMENT. BILLS AND NOTES. CHATTEL MORTGAGES. HUSBAND AND WIFE. INSURANCE, 1, 2. MECHANICS' LIENS. MORTGAGES. PAYMENT. PLEADING. POSTOFFICE, 3, 4. PUBLIC UTILITIES, 7, 8. SALES. SPECIFIC PERFORMANCE. TAXATION, 3. TENANCY IN COMMON. TRESPASS, 2, 3. TRIAL, 2–4, 18. VENDOR AND PURCHASER. WAREHOUSEMEN.

DECEIT. See ASSIGNMENTS.

DEDICATION OF STREETS. See HIGHWAYS, 2.

DEEDS.

See FRAUDS, STATUTE OF, 1. MORTGAGES. TAXATION, 4–6. TENANCY IN COMMON.

Validity: Incompetency of grantor: Undue influence.

1. In an action to set aside a deed from a ninety-five-year-old father to his daughter and her husband, where the evidence showed that the deed was executed when it was apparent that the grantor was dying and that the transaction was concealed from other relatives, findings of the trial court that the grantor was incompetent and that the deed was a result of undue influence are sustained. *Wood v. Coleman,* 554

Delivery: Deed in possession of grantee: Presumption.

2. Where a deed was found in the possession of the grantee after her death, the presumption of delivery of the deed is not rebutted merely by a showing that the grantors had access to the place where the grantee kept the deed, since evidence to rebut the *prima facie* effect of the grantee's possession must be clear and satisfactory. *Giblin v. Giblin,* 632

3. Such possession by the grantee creates a presumption that there had been an actual delivery of the deed. *Ibid.*

Consideration: Presumption.

4. Where deeds recite a consideration and are under seal, a consideration is presumed in the absence of evidence that there was none. *Giblin v. Giblin,* 632

Construction: Ambiguities: Reservation clauses.

5. If there is ambiguity as to the descriptive part of a deed, the court may consider the surrounding circumstances to ascertain the meaning of the instrument; but where the intent of the grantor is clearly expressed, the deed cannot be changed by evidence of extrinsic circumstances. *Hemmis v. Consolidated W. P. & P. Co.* 518
6. In construing deeds, every word and clause is to be taken into consideration. *Ibid.*
7. A deed reserving to the grantor the "use of all of the water power, water flowage and dam privilege forever," is *held* to preclude the grantee from recovering from the grantor's assignee damages for overflow caused by a dam situated below the land conveyed. *Ibid.*
8. A reservation clause in a deed being in effect a grant by the grantee should be construed most favorably to the original grantor. *Ibid.*

DE FACTO CORPORATIONS. See CORPORATIONS, 6.

DEFECTIVE HIGHWAYS. See MUNICIPAL CORPORATIONS, 11, 12.

DEFINITIONS. See WORDS AND PHRASES.

DELEGATION of legislative power. See DETECTIVES, 3.

DELINQUENT CHILDREN. See JURY.

DELIVERY. See BILLS AND NOTES, 4. DEEDS, 3. SALES, 2.

DEMURRER. See DETECTIVES, 6. LIBEL AND SLANDER, 6. PLEADING.

DENTISTS. See PHYSICIANS.

DEPENDENCY. See WORKMEN'S COMPENSATION, 11–14.

DEPENDENT CHILDREN. See INFANTS, 2, 3. JURY, 1.

DEPOTS. See RAILROADS, 1.

DEPRECIATION. See PUBLIC UTILITIES, 7, 8.

DESCENT AND DISTRIBUTION.

See WILLS.

Title to personalty: Vesting.

The legal title to personal property of an intestate vests upon his death in his estate represented by an administrator, and title devolves on those ultimately entitled to share in the personal property after administration and by the final decree of the proper court administering the estate, rather than by operation of law, as does the title to realty. *Pietraszwicz v. Pietraszwicz,* 523

DETECTIVES.

Regulation: Requirement of license: Validity.

1. Under its police power the legislature may regulate private detectives, as has been done by ch. 444, Laws 1919 (sec. 1636—12*m*, Stats. 1919). *Pinkerton v. Buech,* 433
2. Ch. 444, Laws, 1919, providing in sec. 1 that the business of

private detective agencies shall not be conducted without a license; in sec. 2 that any person, partnership, or corporation intending to act as a private detective and establish an office in any city in this state shall present to the secretary of state an application which must be approved by the fire and police commission of those cities having such a commission, and by the chief of police in other cities wherein the office is located; and in sec. 3 that the secretary of state shall issue to the applicant a license if he shall find him to be of good character, competency, and integrity, the requirements as to competency, character, and integrity furnish a standard for action by the fire and police commissions of municipalities in approving or disapproving the application of those desiring to become private detectives. *Ibid.*

3. The provision of the act that the application for a license shall be submitted to the fire and police commissions of municipalities or to the chief of police is not an unlawful delegation of legislative power, the act providing a standard of qualifications and authorizing the issuance of a license only to persons of good character, competency, and integrity. *Ibid.*

4. Although the act itself establishes no system for review by the courts, yet where administrative officers, vested with the power to determine the applicant's character, qualifications, and integrity, act arbitrarily and wrongfully refuse approval, the courts may review the matter by proper remedies. *Ibid.*

5. The provision that the application shall be approved by the fire and police commission in cities having such commission and in others by the chief of police, and in addition by five reputable citizens, is not discriminatory as between applicants intending to engage in the business of private detectives in cities having such a commission and those in cities having none, the classification resting practically on matters of enforcement. *Ibid.*

6. A complaint by applicants desiring to engage in the business of private detectives that the fire and police commission of the city of Milwaukee, authorized by ch. 444, Laws 1919, to pass on their applications, capriciously and wrongfully refused to grant the applications, states a good cause of action, and is not subject to demurrer. *Ibid.*

DEVISE. See PERPETUITIES. WILLS, 4, 6, 9.

DEVOLUTION OF TITLE. See DESCENT.

DIRECTED VERDICT. See RAILROADS, 2.

DISCRETION.

Of court. See ADULTERY, 2. APPEAL, 12, 14. CORPORATIONS, 2. CRIMINAL LAW, 3. INFANTS, 3. SUBROGATION, 3–5. TRIAL, 1.

Of executor. See WILLS, 13, 14.

Of legislature. See APPEAL, 1.

Of trustee. See WILLS, 13.

DISCRIMINATION. See PUBLIC UTILITIES, 4.

DISTRIBUTION. See DESCENT. WILLS, 13, 14, 18.

DIVISION OF ESTATE. See DIVORCE, 3.

DIVORCE.

Custody of minor children: Division of estate.

1. In determining the custody of minor children in a divorce action, the result reached should subserve the best interests of the children, and the conclusion of the trial court should not be disturbed unless clearly wrong. *Jenkins v. Jenkins,* 592
2. In an action of divorce growing out of a situation of estrangement for which no tangible cause can be assigned, but which is actual, the wife testifying that she cannot live with her husband, having no love for him, it was error for the trial court to take the youngest son of three, aged eight, five, and three years respectively, from the custody of the defendant wife, both parties being morally fit to have the custody of the children and both being able to maintain homes for them. *Ibid.*
3. Where the support of two of the three minor sons was charged to the plaintiff husband and the support of the youngest son was cast on the defendant wife, title to the house of the husband worth $1,602, subject to a mortgage of $800, and to furniture worth $1,400, was properly confirmed in him, the wife's earning power almost equaling his, she having her home with her parents. *Ibid.*

DOCUMENTARY TAX. See CORPORATIONS, 3, 4.

DOWER. See ADVERSE POSSESSION, 2. MORTGAGES, 2.

DURESS. See TRIAL, 14.

EASEMENTS.

See FRAUDS, STATUTE OF.

Adverse user: Use not inconsistent with easement.

1. The use of land for pasturage for eight or nine years and thereafter for no other use than to cut wood and trees is not an adverse user for twenty years such as to deprive the owner of an easement entitling him to use the land for water flowage, such use of the land not being inconsistent with the easement. *Hemmis v. Consolidated W. P. & P. Co.* 518

Enforcement of right: Injunction.

2. Where the record sustains a finding that a certain roadway is a private way over which defendant has only an easement by necessity, the defendant will be enjoined from removing, destroying, leaving open, or otherwise rendering useless, gates reasonably maintained thereon by plaintiff. *Florsheim v. Reinberger,* 150

EJECTMENT. See MORTGAGES, 1.

ELECTRICITY. See MUNICIPAL CORPORATIONS, 3. PUBLIC UTILITIES, 1–5, 7–9.

EMINENT DOMAIN.

See HIGHWAYS. MUNICIPAL CORPORATIONS, 7.

Interurban railways: Moving of tracks: Abutting owners.

An interurban railway company which owned the portion of the street on which its tracks were situated, subject to the right of the public to use it for highway purposes, cannot remove its tracks from its private right of way to another portion of the street on demand of the city without assuming liabilities to abutting property owners; and before any condemnation the interurban railway must first obtain the consent of the city thereto. *State ex rel. West Allis v. Milwaukee L., H. & T. Co.* 225

EMPLOYERS' LIABILITY. See FEDERAL EMPLOYERS' LIABILITY. WORKMEN'S COMPENSATION.

EQUITY. See CONTRACTS, 4. COURTS. EASEMENTS, 2. EXECUTORS, 5, 6. FRAUDS, STATUTE OF, 2, 3. INJUNCTION. INTERPLEADER. MUNICIPAL CORPORATIONS, 5, 8, 9. SPECIFIC PERFORMANCE. SPENDTHRIFTS. TAXATION, 1. TENANCY IN COMMON. WORKMEN'S COMPENSATION, 5.

ERROR. See APPEAL AND ERROR.

ESTATES of deceased persons. See EXECUTORS.

ESTOPPEL.

See BROKERS, 6, 7. CARRIERS, 4. CORPORATIONS, 6. FRAUDS, STATUTE OF, 3. INSURANCE, 15. MUNICIPAL CORPORATIONS, 6.

Implied misrepresentation: Reliance.

An essential element of estoppel by silence or implied misrepresentation being that the opposite party is misled by the conduct complained of, the failure of the owners of land to assert their title does not estop them from thereafter asserting it, where the defendant knew exactly what their title was and did nothing in reliance upon their conduct. *Perkins v. Perkins,* 421

EVICTION. See LANDLORD AND TENANT, 9, 10.

EVIDENCE.

See ADULTERY, 2, 3. CUSTOMS, 1. DAMAGES.

Judicial notice: Value of architects' services.

1. In an action to recover for architects' services, consisting of consultations, making of sketches, etc., a court cannot take judicial notice of their reasonable value, such value not being a subject of general knowledge. *Tullgren v. Karger,* 288

Admissions. See MORTGAGES, 1.

Opinion evidence. See INSURANCE, 8, 9. TRIAL, 12.

Parol evidence. See DEEDS, 5. FRAUDS, STATUTE OF, 5, 8.

Weight and sufficiency. See ADULTERY, 1. AUTOMOBILES, 5, 7. BILLS AND NOTES, 2. CRIMINAL LAW, 13. DEATH. DEEDS, 1, 2. EXECUTORS, 2. INSURANCE, 9. PHYSICIANS. RAILROADS, 2. SPENDTHRIFTS, 1. STREET RAILWAYS, 5–10. TRIAL, 5, 12. WORKMEN'S COMPENSATION, 4, 12, 16–20.

Relevancy, materiality, and competency. See ADULTERY, 2, 3. APPEAL, 11. ASSAULT, 5. AUTOMOBILES, 10. CONTRACTS, 1, 2. CUSTOMS, 1, 3–5. DAMAGES, 2. TRESPASS, 1.

Degree of proof in civil cases. See TRIAL, 5.

2. The rule of evidence in civil cases generally is that the jury are required to be convinced or satisfied of the existence of facts by the preponderance of the evidence, though in certain classes of cases a higher degree of proof is required. *Estate of Utter,* 180

Res gestæ: Declarations of bystander.

3. The testimony of a passenger on a car which had injured plaintiff that after it started up again he upbraided the conductor for not picking up the man is inadmissible, not being part of the *res gestæ,* and, even if so considered, not being an expression characterizing the injury. *Kausch v. Chicago & M. E. R. Co.* 220

4. In an action for damages resulting from a collision, a report by an employee of a liability company insuring defendant which covered an interview with the plaintiffs was inadmissible in evidence. *Smith v. Yellow Cab Co.* 33

Same: Conversations not in plaintiff's presence. See TRIAL, 8.

5. In an action for the value of radiators loaned to defendant, manager of a political campaign, evidence on his behalf as to portions of conversations between him and his representative, who borrowed the radiators, which did not occur in plaintiff's presence and which tended to show that they were borrowed by defendant on behalf of a campaign committee, was inadmissible against plaintiff. *Bradley v. Harper,* 103

Pleadings as evidence. See TRIAL, 4.

Verdict of coroner's jury. See AUTOMOBILES, 10.

EXCEPTIONS. See APPEAL, 6.

EXCESSIVE DAMAGES. See LIBEL AND SLANDER, 7, 8.

EXCHANGE OF PROPERTY.

Burden of proof after change of possession.

1. Where plaintiff contended that he had exchanged a large bull for defendant's small bull for a season only, but possession and all indicia of ownership of the animals had changed, the burden of proving that the exchange was for a limited time rests on the plaintiff. *Hinze v. Kurz,* 579

2. Where plaintiff claimed that the exchange was for only a season, while defendant asserted it was permanent, an instruction that unless the minds of the parties met in agreement on an exchange for the season judgment should go for defendant

was correct, the contract being executed and plaintiff having the burden of proof. *Ibid.*

3. An instruction that if plaintiff honestly believed he was making the exchange for a season only and defendant honestly believed the same the verdict should be for plaintiff, was not proper, as a party is bound not by what he honestly believes but by what he understands and agrees to; but on the whole record it is *held* that the error was not prejudicial within sec. 3072*m*, Stats.

EXECUTORS AND ADMINISTRATORS.

See COURTS, 1–3. DESCENT. LANDLORD AND TENANT, 13, 14. WILLS.

Powers of personal representative: Control of assets.

1. Until either a special or a general administrator or executor, holding the legal title to the assets of an estate, does some act which is an invasion, or threatens to do that which amounts to an injury and infringement, of the equitable beneficial interests of the legal distributees, the primary right of possession and control over such assets is in such representative. *Pietraszwicz v. Pietraszwicz,* 523

Claims against decedent: Degree of proof required.

2. To support a claim against a decedent's estate by one alleging she had loaned decedent $2,500, it was not necessary that the jury be satisfied by evidence that was clear, convincing, and satisfactory that claimant had made the loan. A mere preponderance of the evidence in favor of claimant is sufficient. *Estate of Utter,* 180

Purchase of real estate by executor: Validity: Accounting.

3. Although sec. 3914, Stats. (providing that an executor shall not directly or indirectly purchase or be interested in the purchase of any part of real estate sold by him), declares sales made contrary to such provision shall be void, such sales are voidable only, and an action to set the same aside must be brought within the five-year period fixed by sec. 3918. *Will of Hoya,* 196

4. Where a residuary legatee, through his attorneys, had notice that the executor had purchased real estate of the estate, but acquiesced in the approval of the sale by the county court, he cannot, after final settlement, attack the purchase on appeal to the circuit court.

5. Where an executor purchased real property of the estate and made a profit, he may be compelled as trustee to account therefor. *Ibid.*

6. One accepting such a trust as executor becomes thereby chargeable in some way with existing obligations which he owes to the estate he undertakes to administer. *Ibid.*

Liability of executor to decedent: Limitation of actions.

7. The running of the statute of limitations absolutely extinguishes the cause of action, such statutes in this state not being treated

as statutes of repose; hence one who becomes an executor of a decedent's estate does not thereby become chargeable with debts which he owed testatrix but which were barred by the statute. *Will of Hoya,* 196

EXEMPLARY DAMAGES. See LIBEL AND SLANDER, 9, 10.

EXPLOSIVES.

Filling gasoline tank: Explosion.

In an action for injuries to the rider of a motorcycle when gasoline ran over the edge of the tank onto the hot radiators and exploded while the tank was being filled, evidence which did not show whether the gasoline was spilled over the edge or flowed over it from an expulsion from the container in the process of filling, in connection with the uncontradicted testimony of an employee of the defendant that the quantity of gasoline ordered by plaintiff had not been supplied when the explosion occurred, is *held* to leave the cause of the explosion to mere speculation and conjecture, and a nonsuit was properly granted. *Pinter v. Wenzel,* 84

FACTORS.

See BROKERS. WAREHOUSEMEN.

Sale of property of principal: Authority.

In the absence of a statute giving him authority so to do, a factor has no power to pledge for his own indebtedness the personal property of his principal. *Jacob E. Decker & Sons v. Milwaukee C. S. Co.* 87

FAIR CRITICISM. See LIBEL AND SLANDER, 5.

FALSE REPRESENTATIONS. See FRAUD. WORKMEN'S COMPENSATION, 21.

FEDERAL EMPLOYERS' LIABILITY.

Liability of master for hidden defects.

1. The federal employers' liability act of April 22, 1908 (35 U. S. Stats. at Large, 65, ch. 49), does not require a carrier receiving cars from another carrier to sever integral parts of a car in order to discover possible decay or corrosion within, and a failure to so do does not render the carrier liable for an injury to an employee caused by a hidden defect. *Berry v. Director General of Railroads,* 473
2. A railroad company is not bound to inspect cars for defects when they are delivered to a car repairer for restoration; and though he was injured when the transom on which rest the sills of a refrigerator car fell, the car having been jacked up preparatory to the removal of the transom, there can be no recovery under the federal act, notwithstanding the sills and bolts holding the transom were defective. *Ibid.*

FINDINGS OF FACT.

Of civil court of Milwaukee county. See COURTS, 6.

Of industrial commission. See WORKMEN'S COMPENSATION, 19.

FIRE INSURANCE. See INSURANCE.

FLOOD. See TRESPASS, 1, 2. TRIAL, 1.

FRANCHISE. See MUNICIPAL CORPORATIONS, 5, 7–9. PUBLIC UTILITIES, 1, 2, 6. STREET RAILWAYS, 3, 4.

FRATERNAL INSURANCE. See INSURANCE, 16.

FRAUD.

See BILLS AND NOTES, 3. CORPORATIONS, 6. DEEDS, 1. MORTGAGES, 4. WORKMEN'S COMPENSATION, 5, 21.

Deception constituting fraud: Conspiracy.

1. A complaint in an action to recover damages for misrepresentations in the sale of land to plaintiff which alleged that three of the five defendants made actionable representations and charged that all of the defendants planned and conspired to conceal material facts from plaintiff and helped to plan the ways and means by which the fraud was consummated, states a cause of action against the two defendants who did not participate in the misrepresentations. *Booker v. Pelkey,* 24
2. Such a complaint is based on a concerted plan of action to defraud, which renders all defendants liable for the injury, and is not subject to the objection that it does not show a conspiracy to defraud by making false and material representations. *Ibid.*
3. The complaint, alleging that defendants participated in a common plan to defraud plaintiff, states a single cause of action against all of them, although they took different parts in carrying out the plan; and the same rule of damages should be applied to each defendant. *Ibid.*

Same: Misrepresentation of fact: Expressions of opinion.

4. A misrepresentation that the price to a prospective purchaser is the lowest price at which the owner of land would sell is a misrepresentation as to a fact, not a matter of opinion, and is actionable if false. *Estes v. Crosby,* 171 Wis. 73, followed. *Booker v. Pelkey,* 24
5. Testimony that the sale of a dredge was fraudulently induced by misrepresentations as to its capacity and equipment is admissible to prove fraud, notwithstanding a provision of the contract that it embodied the entire understanding between the parties and that the seller's liability should not be affected by any statement or representation not contained therein, *Jones v. Brandt,* 539
6. Representations that the dredge was of a kind and construction such as to properly do the work desired and that it was equipped with an engine of a particular kind and capacity, are actionable as against the contention that they were mere expressions of opinion. *Ibid.*
7. Though mere promises are not a basis for fraud, and though ordinarily fraud cannot be predicated on mere expressions of opinion, expressions of opinion may, under some circumstances, be treated as statements of facts. *Ibid.*

Waiver of defects: Acceptance on assurances of satisfaction.

8. Acceptance of a dredge, induced by the assurance of the agent of the seller that the dredge would be made to work satisfactorily, did not constitute a waiver of defects. *Jones v. Brandt,* 539

FRAUDS, STATUTE OF.

See VENDOR AND PURCHASER, 2.

Necessity of writing: Real estate and interests therein: Restrictive easements.

1. A legal restriction on the use of lands conveyed must be in writing under sec. 2302, Stats., and a deed cannot be reformed to include a mutual understanding which was not to be inserted in the deed. *Florsheim v. Reinberger,* 150
2. While courts of equity will, under some circumstances, imply and recognize restrictive equitable easements not recognized by courts of law in order to protect parties in the use of their property, and while such easements usually arise out of written covenants, yet this is not essential. *Ibid.*
3. An agreement restricting the use of property which was not inserted in the deed will not be enforced as creating an equitable easement where there are no rights arising from acts or conditions long enjoyed and where the parties have made no improvements in reliance thereon nor acted on a scheme of improvement of adjacent property such as to arouse the court's equitable power by way of estoppel. *Ibid.*

Same: Sale of standing timber: Change of writing by parol agreement.

4. A contract for the sale of standing timber relates to an interest in land and comes within the statute of frauds (sec. 2302. Stats.). *Schaap v. Wolf,* 351
5. Where a contract for the sale of standing timber required its removal by the buyer before a specified date unless the vendor continued to own the farm during the following winter, in which case the purchaser could remove the timber at such time, a parol modification of the contract, providing for removal of the timber during the following winter regardless of whether the vendor continued as owner, is void under sec. 2302, Stats., since a contract within the statute of frauds cannot be validly changed as to a material condition by an oral agreement. *Ibid.*

Same: Sale of corporate stock.

6. An oral agreement by a stockholder in a corporation to repurchase stock sold and delivered by another stockholder was within the statute of frauds and void (sec. 2307, Stats.), although such agreement was a part of the inducement extended to the purchaser. *Korrer v. Madden,* 152 Wis. 646, followed. *Becker v. Kreul,* 273

Sufficiency of writing: Uncommunicated acceptance of offer.

7. Where an owner of land signed a letter accepting the purchaser's offer, but did not send the letter until after he had

received notice that the purchaser had withdrawn his offer, there was no binding contract within sec. 2304, Stats., requiring a contract relating to an interest in lands to be in writing. *Helmholz v. Greene,* 306

Same: Where recourse to parol testimony is necessary.

8. A telegram to his principal from the agent for defendant, the alleged buyer of fish from plaintiff, that he could buy the fish for twelve cents and had offered eleven and one-half, and that a $500 deposit was demanded, and a reply from defendant to pay a half cent more if necessary, that the $500 was wired, and to ship the car on a given date, are *held* not to show, taken together, a completed contract in writing, satisfying the statute as to the price agreed on, since to reach the conclusion that the price was twelve cents a pound recourse to parol testimony that the contents of the buyer's telegram were conveyed to plaintiff is necessary. *Wiedner v. National Fisheries Co.* 559

Part performance.

9. An allegation in the complaint of the seller of a carload of fish that the defendant buyer refused to accept the car involved after it was partly loaded, or to pay for it, negatived part performance of the contract of sale. *Wiedner v. National Fisheries Co.* 559

FREIGHT. See CARRIERS, 4. STREET RAILWAYS, 4.

GENERAL ADMINISTRATOR. See EXECUTORS, 1.

GIFTS. See PERPETUITIES. WILLS, 10, 11.

GOOD FAITH. See IMPROVEMENTS. MORTGAGES, 3. WORKMEN'S COMPENSATION, 5.

GRANTEE. See TAXATION, 4.

GROSS NEGLIGENCE. See STREET RAILWAYS, 10.

GUARDIAN. See SPENDTHRIFTS.

GUESTS. See AUTOMOBILES, 1–3. NEGLIGENCE, 6.

HIGHWAYS.

See AUTOMOBILES. MUNICIPAL CORPORATIONS, 5–12. PUBLIC UTILITIES.

Use by railways: Abutting owners.

1. This court has held (a) that city streets are subject to ordinary surface street railway service without compensation to the owner of abutting lands; (b) that country highways or streets outside of city limits are not subject to ordinary street railway service without extra compensation to the owners of abutting lands who thereby suffer serious impairment to their right of access to such lands; and (c) that neither city streets nor country highways are subject to interurban railway service without compensation to the owner of abutting lands. *Milwaukee v. Milwaukee E. R. & L. Co.* 400

2. The purpose of dedicating streets and highways for public use is to permit travel thereover, and the means by which travel is effected is secondary to the primary purpose and

may change from time to time with new inventions and changed conditions. *Ibid.*

Law of the road. See AUTOMOBILES.

HOLDER.
For value. See MORTGAGES, 3.
In due course. See BILLS AND NOTES, 2–4.

HUSBAND AND WIFE.

See ADVERSE POSSESSION, 2. MORTGAGES, 2. TRIAL, 8.

Contracts of married women: Separate estate: Wife as creditor of husband.

1. In an action at law upon promissory notes, a married woman may successfully assert her common-law inability, by reason of coverture, to make a binding promise to pay money, unless the circumstances bring her within the intent and meaning of the enabling statutes, particularly sec. 2345, Stats., giving a married woman the rights of a *fême sole* as to her separate property. *Farmers & Merchants Bank v. Frederiksen.* 645
2. The fact that a wife was a creditor of her bankrupt husband did not give her such an interest in his financial welfare and business as would make her liable on a note with him under said sec. 2345. *Ibid.*
3. The words "I hereby pledge my separate estate," written on the face of a note just above the signature of a married woman, do not place such note in any better position, so far as the rights of the holder are concerned, than other notes without such declaration. *Ibid.*

IMPLEADING. See SUBROGATION, 5.

IMPLIED ACQUITTAL. See CRIMINAL LAW, 11.

IMPLIED CONTRACT. See BAILMENT. CONTRACTS, 4.

IMPROVEMENTS.

See FRAUDS, STATUTE OF, 3.

Necessity of good faith.

One whose possession of premises was not adverse by color of title asserted in good faith cannot recover for improvements made on the premises under secs. 3096, 3097, Stats. *Perkins v. Perkins.* 421

IMPUTED MALICE. See LIBEL AND SLANDER, 10.

IMPUTED NEGLIGENCE. See AUTOMOBILES, 2, 3.

INCOME TAX. See TAXATION.

INCOMPETENTS. See SPENDTHRIFTS.

INDETERMINATE PERMIT. See PUBLIC UTILITIES.

INDORSEMENT. See BILLS AND NOTES, 4.

INDUSTRIAL COMMISSION. See LANDLORD AND TENANT, 11. WORKMEN'S COMPENSATION.

INFANTS.

See ADVERSE POSSESSION, 2. DEATH. DIVORCE.

Juvenile courts: Nature.

1. The court of record which is designated by the judges in each county as the court for the exercise of juvenile jurisdiction conferred on all courts of record is not a separate juvenile court, and the venue and other papers on appeal therefrom should be stated as from the county court or other court designated and not as from the juvenile court. *In re Johnson,* 571

Dependent and neglected children: Nature of proceedings against.

2. Proceedings against children alleged to be dependent and neglected are not criminal proceedings, but are in the exercise of the police power of the state for the protection of the children. *In re Johnson,* 571
3. The granting of separate trials to such children rests in the discretion of the trial court; and, in proceedings against four children alleged to be dependent and neglected, where all the children had the same mother, but two were by a former husband, and they were all living together with their mother and her present husband so that the same circumstances would necessarily be brought in evidence as to each child, it was a proper exercise of the discretion of the trial court to refuse to grant a separate trial to each child. *Ibid.*

INJUNCTION.

See COURTS, 2. EASEMENTS, 2. EXECUTORS, 1. MUNICIPAL CORPORATIONS, 5.

To restrain prosecution under invalid statutes.

Injunction against issuing or applying for the issuance of warrants may be invoked to protect property rights and for protection against prosecution in criminal proceedings under invalid statutes. *Pinkerton v. Buech,* 433

INSTRUCTIONS TO JURY. See ANIMALS, 4. APPEAL, 7. ASSAULT, 3, 5, 7. BAILMENT, 2. CRIMINAL LAW, 14. EXCHANGE OF PROPERTY, 2, 3. SALES, 7. TRIAL, 6, 9–11.

INSURANCE.

See EVIDENCE, 4. INTERPLEADER. TRIAL, 8. WORKMEN'S COMPENSATION, 5, 10.

Taxation: Loans to policy-holders: Interest as taxable income. See PLEADING.

1. A complaint in an action by a mutual life insurance company which alleged that it had paid under protest income taxes on interest accrued on loans made to its policy-holders, not paid in cash but added annually to the principal until the loan and interest equals the cash surrender value of the policy, at which

time the loan and the policy are canceled, and sought recovery of the sums so paid under protest, not because an annual settlement was not made with the borrowers but because the loans did not result in a profit to the company, does not state a cause of action. *Northwestern Mut. L. Ins. Co. v. State.* 119

2. The fact that a mutual life insurance company has paid all taxes due on the funds it uses to pay policies cannot affect its duty to pay taxes on income derived from loans made by it on the security of such policies. *Ibid.*

Construction of contract: Ambiguities.

3. Insurance contracts should be construed most strongly against the insurer, but they are subject to the same rules of construction applied to the language of any other contract. It is not permissible to impute an unusual meaning to language used in a contract of insurance any more than to the language of any other contract. *Bell v. American Ins. Co.* 533

Same: "Accidental collision" of automobile.

4. A policy insuring plaintiff against damage resulting to his automobile "by being in accidental collision during the period insured with any other automobile, vehicle, or object" was not an obligation to indemnify plaintiff for damage to his car when, while on the highway, one side of the car gradually settled into the ground and the car tipped over, striking the ground to its damage, such casualty not being a "collision" as the word is commonly understood. *Bell v. American Ins. Co.* 533

5. In a policy insuring an automobile owner against damage resulting to his automobile by accidental collision during the policy period with "any other automobile, vehicle, or object," the use of the word "object" came within the exception to the rule of *ejusdem generis,* and, the specific words embracing all objects of their class, the general words must bear a different meaning from the specific words or be meaningless. Language in *Wettengel v. United States "Lloyds,"* 157 Wis. 433, intimating a contrary holding, withdrawn. *Ibid.*

Same: Insured in "regular army:" Change in occupation.

6. Although the federal statutes providing for a military establishment of the United States distinguish between "*the* regular army" and other military organizations, an insured who joined the Wisconsin National Guard and later became a member of the army of the United States was subject to the provisions of a clause in his insurance certificate decreasing the benefit in case the insured died while engaged in certain designated employments, one of which was "regular army." *Huntington v. Fraternal Reserve Asso.* 582

7. Under the clause decreasing liability in case a claim accrues while the insured was engaged in a changed occupation, "whether resulting from such changed occupation or not, directly or indirectly," the beneficiary is not entitled to recover the face value of the certificate, even though the insured died from natural causes and not from any hazard peculiar

to war. *Kelly v. Fidelity Mut. L. Ins. Co.* 169 Wis. 274, distinguished. *Ibid.*

Cause of death: Accident insurance: Asphyxiation: Proof.

8. In an action on an accident policy insuring only against death by external, violent, and accidental means and excepting death from asphyxiation, testimony by three witnesses that they saw a reddish spot on the temple of deceased a short time after his death and an opinion by a physician that a blow had caused the death are insufficient to warrant a finding that death was caused by an external and violent blow and not by asphyxiation from automobile fumes which the evidence showed were present at the time and place of death. *Dreher v. United Commercial Travelers,* 173

9. The opinion of an expert must be based upon facts, proved or assumed, sufficient to form a basis for the opinion, and cannot be invoked to supply the substantive facts necessary to support the conclusion; so that an opinion by a physician, based only on evidence that witnesses had seen a reddish spot on the temple of deceased, without evidence of any external cause for such spot, that the death of deceased was due to a blow which caused the spot, is not evidence sufficient to take the question to the jury. *Ibid.*

Coverage of policy: Mechanic killed at automobile race.

10. A compensation policy in general terms, procured by an automobile dealer complying with the workmen's compensation act (sub. 2, sec. 2394—24, and sub. 1, sec. 2394—27), covers a mechanic employed as a pitman during an automobile race who was killed while venturing onto the track, although the insurer had not filed premium rates or classification of employees engaged in automobile racing and there was some evidence that the insured employer, compelled to pay compensation, had not regarded accidents occurring during automobile races as covered by the policy. *Frint M. C. Co. v. General A., F. & L. A. Corp.* 109

Mutual insurance companies: By-laws. See INTERPLEADER.

11. Persons claiming under a life insurance policy are bound by a by-law of the insurer, a part of the contract between the insurer and the insured, providing for a deduction by the insurer of its court costs and attorney's fees incurred in determining to whom the insurance shall be paid. *Women's Catholic Order of Foresters v. Krivitz,* 247

12. Where the by-laws of a mutual hail and cyclone insurance company required that a member be given a second notice by mail of delinquency in the payment of an assessment, a member in default was entitled to vote where it did not appear that the second notice had been given. *State ex rel. Hemmy v. Miller,* 412

Same: Officers: Eligibility.

13. Where the articles of incorporation of a mutual hail and cyclone insurance company, after reciting who should be the first officers and directors, declared that each officer should

reside at the place of the home office, while other sections declared that each director should be a *bona fide* resident of the state, one not residing at the place of the home office is ineligible to be an officer. *State ex rel. Hemmy v. Miller,* 412

Same: Consent to additional insurance: Estoppel.

14. Evidence that the secretary of an insurance company, on receiving a letter from one of its policy-holders stating that he had taken out additional insurance, replied that he thought the amount of insurance too high but that their agent was directed to look it over, with evidence that the agent also disapproved the amount of insurance, is *held* not to show consent in writing by the secretary for the additional insurance, without which such insurance invalidated the policy sued on. *Emmons v. Farmington Mut. F. Ins. Co.* 589

15. The fact that the defendant's secretary and representatives negotiated with plaintiff after a loss by fire and requested him to sign proofs of loss does not show that plaintiff suffered any substantial expense or trouble that would estop defendant from interposing the defense that the policy had been forfeited. *Ibid.*

Fraternal insurance: Authority of officers.

16. Under by-laws of a fraternal insurance association providing that the officers of a local council were agents of the members and not of the supreme council, and had no authority to disregard laws of the order relative to death certificates or funds, the secretary of a local council had no authority to bind the insurer by a statement to a beneficiary that the certificate of the insured, who had enlisted in the army in time of war, did not require the payment of extra assessments to keep the certificate good for its full value as long as insured was on this side of the ocean. *Huntington v. Fraternal R. Asso.* 582

INTEREST.

See PUBLIC UTILITIES, 8. WILLS, 10, 15–17.

On unliquidated claims.

Expenditures for the services of a physician, hospital services, and funeral expenses are items of damage caused by personal injury resulting in death, but they are not liquidated until the amount is determined by the verdict; and it was error for the court to allow interest on the amount of such expenditures upon a stipulation by the parties fixing the amount. *First Wisconsin Trust Co. v. Schmidt,* 477

INTERPLEADER.

See INSURANCE, 11.

Right to bring action: Relief.

1. The assertion of a claim to life insurance both by the beneficiary named in the policy and by the legatee of the insured and failure of either to bring an action for over ten months,

is *held* to warrant the insurer in bringing an action of interpleader against them. *Women's Catholic Order of Foresters v. Krivitz,* 247

2. One of two defendants against whom an interpleader action was brought, having formally consented to the granting of the relief prayed for, cannot on appeal question the right or propriety of plaintiff's instituting the action or being allowed the relief asked. *Ibid.*

INTERURBAN RAILWAYS. See EMINENT DOMAIN. MUNICIPAL CORPORATIONS. STREET RAILWAYS, 2.

INVITEE. See NEGLIGENCE, 4–6.

JEOPARDY. See CRIMINAL LAW, 4–12.

JOINT TORTFEASORS. See DAMAGES, 1, 2.

JUDGES.

See VENUE.

Qualification to act: Son as attorney in case.

The fact that a son of the presiding judge was one of the attorneys for the plaintiff in an action for the death of plaintiff's intestate did not disqualify the judge under sec. 2623, Stats., providing for a change of the place of trial where the judge is related to a party to the action, in the absence of evidence that the son was to be compensated by a contingent fee. [Whether the judge would be disqualified if the son were prosecuting the case upon a contingent fee, not decided.] *Groeschner v. John Gund Brewing Co.* 366

JUDGMENT. See COURTS, 4, 5. PAYMENT. SPECIFIC PERFORMANCE. TAXATION, 1. TRIAL, 18.

JUDICIAL NOTICE. See EVIDENCE, 1.

JURISDICTION.
Of courts. See COURTS.
Of industrial commission. See WORKMEN'S COMPENSATION.
Of railroad commission. See CARRIERS, 3.

JURY.

See CRIMINAL LAW, 1. EVIDENCE, 2. TRIAL.

Right to trial by jury: Neglected children.

1. Since sub. (1) (a), sec. 48.01, Stats. 1919, defines dependent child and neglected child as meaning the same thing, sub. (4) of the same section entitles a neglected child to a trial by jury on demand, though in terms it refers only to dependent and delinquent children. *In re Johnson,* 571

Qualification and competency of jurors: Examination.

2. A juror who says he can and will give the defendant the benefit of the presumption of innocence; who can and will disregard any opinion he may have formed or expressed as to defendant's guilt or innocence; and who can and will try defendant

impartially on the evidence given in court and on that alone, is competent. *Mainville v. State,* 12

3. While reasonable latitude should be given parties in the examination of jurors to gain knowledge as to their mental attitude toward the issues to be tried for the purpose of aiding them in striking, if not successful in sustaining a challenge for cause, such scope does not extend to an inquiry into the juror's attitude towards a particular witness who is expected to testify in the case. *Ibid.*

JUVENILE COURTS. See INFANTS.

LAND CONTRACT. See BILLS AND NOTES, 2. VENDOR AND PURCHASER.

LANDLORD AND TENANT.

Construction of lease.

1. The reasonable construction of a term having two meanings is the one which gives validity to the thing sought to be done rather than the one which makes the act nugatory. *Scheuer & Tiegs, Inc. v. Benedict,* 241
2. A lease containing a clause that the lessor should not be liable for any loss or damage sustained by the lessee by reason of any act or neglect of any contractor, employee, agent, or servant of the lessor or other person, and that such loss or damage should not abate or reduce the rent of the premises, was not void for lack of mutuality as to consideration on the ground that the lessee did not have an assurance of peace and enjoyment, the question as to whether or not a consideration is adequate being a matter exclusively for the decision of the parties. *Estate of Miller,* 322
3. Where a lease expressly exempted the landlord from furnishing the tenant electric and heat service, and an oral agreement under which he furnished it for a time to the tenant stipulated no definite period and the tenant was put to no expense in continuing to use it, such executory oral agreement, being revocable at will on reasonable notice, cannot be made the basis for a continuing duty on the part of the landlord to furnish electricity and heat. *Mandarin Co. v. Toy,* 461

Month-to-month tenancies: Termination: Notice to quit.

4. While a tenancy at will or at sufferance was at common law different from a periodic tenancy, sec. 2183, Stats., requiring the landlord to give notice of the termination of the tenancy in writing, has operated to remove the distinction between the two tenancies, and the words "tenancy at will" in the statute include periodic tenancies. *Molter v. Spencer,* 38
5. A month's notice pursuant to said sec. 2183, in order to terminate a tenancy, must expire at the end of the rent month; and by "one month's notice" to quit is meant the number of days in the calendar month in which the notice is given. *Ibid.*

6. In case of a tenancy, where the end of the rent month, beginning February 25th, was the 24th of March, and the 25th of March was the first day of a new period, the landlord's notice, pursuant to sec. 2183, served February 25th, and attempting to terminate the tenancy March 25th, was insufficient, as lacking one day of being a month's notice. [If the notice had been given one calendar month prior to the last day of the rent month, the effect of requiring the tenant, by the terms of the notice, to remove on the first day of a new term, not determined.] *Ibid.*

7. Under a tenancy from month to month, a notice to quit must be to terminate the tenancy at the end of the month and not before. *Scheuer & Tiegs, Inc. v. Benedict,* 241

8. Where defendant was a tenant from month to month, whose rent was payable on the first day of each month, plaintiff's notice to quit, served on defendant March 5, 1920, "You are hereby notified and required by April 30, 1920, to quit and deliver up possession" of the premises, was sufficient, as terminating the tenancy at the end of the month and not before, for the word "by" in such notice would be construed, in favor of the validity of the notice, to include April 30th, that is, to include the day or date marking the boundary of time, especially since the verb used with it denoted present or continuing rather than completed action. *Ibid.*

Premises and enjoyment thereof: Disturbance by playing of music.

9. The lessee of a portion of a building for a motion-picture theater could not defeat the payment of rent during the period of his occupancy or recover damages because another tenant in the building in the restaurant business furnished his patrons with music out of harmony with the music played in the theater, where there is not a sufficient showing of responsibility on the part of plaintiff for the situation complained of. *Toy v. Olinger,* 277

10. The fact that the odor of onions escaped from the basement of the building into the theater was not a constructive eviction of the tenant operating the theater, either partial or whole, where he continued to pay rent and remained in possession. *Ibid.*

Same: Unsafe passageway: Injury to tenant.

11. Under sec. 2394—48, Stats., requiring every employer and every owner of a public building to construct and maintain it so as to render the place or building safe, the owner of an apartment house, which was a public building as defined by sub. (12), sec. 2394—41, is liable to a tenant for injuries resulting from the unsafe condition of a passageway, regardless of the landlord's liability at common law and without the industrial commission having taken any action to enforce the section. *Zeininger v. Preble,* 243

12. Uncontradicted evidence that the floor of an upstairs porch in an apartment building was not reasonably safe, that no in-

spection had been made as ordered, and that while the defect might have been discovered by a proper inspection it was not plainly visible to the unpracticed observer, shows the failure of the landlord to perform her statutory duty as the owner of a public building to maintain the passageway in a reasonably safe condition. *Ibid.*

Rents: Releasing: Liability of first tenant.

13. Where the son of a lessee entered leased premises shortly prior to the death of his father, and the furniture and professional equipment of the deceased remained upon the premises until the termination of the lease, there was no reletting of the premises to the son so as to operate as a termination of the lease and a discharge of the lessee's estate from liability, although the lessor accepted rent paid by the son. The filing of a claim by the lessor against the estate of the lessee for the amount of the rent due for the entire period of the lease was notice to the administratrix that the lessor elected to hold the estate for the rent for the entire period, and not to terminate it, as it might have done under the lease. *Estate of Miller,* 322

14. Where, upon the death of the lessee, the lessor elected to hold his estate liable for the rent, there was no obligation on the part of the lessor to use diligence to collect rent from the son, who was occupying the premises, the latter being under no obligation to pay to the lessor. *Ibid.*

LAW MERCHANT. See WAREHOUSEMEN.

LAW OF THE ROAD. See AUTOMOBILES.

LEASE. See BROKERS, 3. CORPORATIONS, 6. LANDLORD AND TENANT.

LEGACIES. See INTERPLEADER. WILLS, 7, 8, 10–12.

LEGISLATURE. See PUBLIC UTILITIES, 6.

LIBEL AND SLANDER.

Libelous words: In pleadings.

1. Publication of language which tends to injure one in his reputation and to degrade and disgrace him in society is libelous. *Finnegan v. Eagle Printing Co.* 5

2. Great freedom is allowed to parties in stating in their pleadings the facts relied on to establish their rights; but the publication of pleadings or other preliminary papers to which the attention of no judicial officer has been called and no judicial attention invited, is not privileged. *Ibid.*

Same: Publication of statements of third person.

3. In an action for libel against a newspaper it is no defense that the newspaper only published statements communicated to it by a third person. *Finnegan v. Eagle Printing Co.* 5

Defenses: Privilege: Comment on acts of public officers.

4. Publications containing insulting, contemptuous phrases or false and libelous statements of fact are not privileged, even though they concern the acts of public officers. *Finnegan v. Eagle Printing Co.* 5

5. The defense of privilege or fair criticism and proper comment is not available in an action for libel brought by the plaintiff, who is a private citizen and not a public officer or a candidate for office, and is not a member of any class seeking and inviting public patronage. *Ibid.*

6. In a libel action, where a third defense setting up privilege referred to the second defense setting up justification and made such second defense a part of the third defense, a demurrer to the latter on the ground that the facts alleged did not show privilege cannot be sustained, since the court cannot disregard the incorporation of the second defense into the third nor treat it on demurrer as mere surplusage. *Ibid.*

Damages: Question for jury.

7. The determination of the damages sustained by plaintiff by reason of the printing of a libelous article in a newspaper is peculiarly a question for the jury, and the trial court cannot set aside the verdict on the ground that the damages awarded by the jury were excessive unless they were so excessive as to create the belief that the jury had been misled by passion, prejudice, or ignorance. *Webb v. Call Publishing Co.* 45

8. A verdict awarding $1,000 as actual damages for the publication of a newspaper article charging that a young man whose occupation called for character, integrity, and trustworthiness was a forger, is not so excessive as to indicate that the jury was moved by passion, prejudice, or ignorance. *Ibid.*

Same: Effect of retraction on damages.

9. Where the plaintiff made no claim for exemplary damages, evidence that defendant, shortly after publishing the libelous article, published a retraction thereof which it gave the same circulation as the libelous article, is material as showing that the damage to plaintiff was not as great as if the libel had not been retracted. *Webb v. Call Publishing Co.* 45

10. Sec. 4256*a*, Stats., making a retraction published within a reasonable time a defense against any imputation of malice and against the recovery of any damages except actual damages, does not imply that evidence of such retraction is inadmissible in mitigation of actual damages. *Ibid.*

LICENSEES. See NEGLIGENCE, 5, 6. RAILROADS, 2–4.

LICENSES. See DETECTIVES.

LIENS. See CARRIERS. MECHANICS' LIENS.

LIFE INSURANCE. See INSURANCE.

LIFE TENANTS. See WILLS, 17.

LIMITATION OF ACTIONS. See ADVERSE POSSESSION. EXECUTORS, 7. TENANCY IN COMMON.

LOGS AND LOGGING.

See TRESPASS, 1.

Construction of contract: Sorting of timber. See CUSTOMS.

1. In a contract to cut, log, and deliver timber on cars as directed by the owner, the provision relative to direction by the owner

authorized him to direct details with reference to the prosecution of the work, but did not authorize him to require the sorting of the timber, which work was reasonably worth several thousand dollars. *Dieck v. Oconto Co.* 156

2. Where the evidence showed that the contractor did not sort all of the logs cut, a finding by the jury as to the quantity he did sort, which was apparently an honest endeavor by them to determine a question peculiarly for their consideration, will not be disturbed on appeal, though the method by which they arrived at their verdict was not manifest. *Ibid.*

MALICE. See LIBEL AND SLANDER, 10.

MALPRACTICE. See PHYSICIANS.

MANDAMUS.

See CORPORATIONS, 2.

Nature: Practice and pleading.

1. A proceeding by *mandamus* is essentially a civil action so far as the rules and practice as to pleadings are concerned. *State ex rel. Dempsey v. Werra A. F. Co.* 651

2. In an application for *mandamus* to compel a corporation to permit inspection of its books by a stockholder, the relator can allege, on information and belief, a demand for such inspection by his attorney in fact and the refusal thereof by the officers of the corporation, since those matters were not within his personal knowledge. *Ibid.*

MARRIAGE. See DIVORCE. HUSBAND AND WIFE.

MASTER AND SERVANT.

See ASSAULT, 1. FEDERAL EMPLOYERS' LIABILITY. LANDLORD AND TENANT, 11, 12. WORKMEN'S COMPENSATION.

Who are employees: Evidence.

1. In an action by an employee for damages for personal injuries against one of two corporations on the theory that they constituted one legal entity, both being engaged in carrying on distinct businesses, each owning its own property, each receiving and disbursing its own revenues, and each engaging its own employees, *held,* under all the evidence, there was no ground shown upon which the plaintiff could be treated as an employee of the defendant. *Bosanich v. Chicago, N. S. & M. R. Co.* 280

Statutory regulation: Minors: Treble damage for injuries: Validity. See WORKMEN'S COMPENSATION, 21.

2. Ch. 624, Laws 1917, providing for treble compensation in cases where a minor of permit age is allowed to work without a permit, is constitutional. *Brenner v. Heruben,* 170 Wis. 565, reaffirmed. *Mueller & Son Co. v. Gothard,* 135

Respondeat superior: Liability for negligence of servant.

3. Where a taxicab driver, in violation of his master's directions, took passengers outside of the city limits, where they left

the vehicle without paying, he was, while returning home, within the scope of his employment so as to render the master liable for his negligence under the doctrine of *respondeat superior*. *Smith v. Yellow Cab Co.* 33

MAXIMS.
De minimis non curat lex, 312.
Ejusdem generis, 533–535.
Res ipsa loquitur, 192, 195.
Respondeat superior, 33, 35.
Stare decisis, 493, 496, 497.

MAYOR. See MUNICIPAL CORPORATIONS, 1, 2.

MECHANICS' LIENS.

Waiver by agreement: Taking of note: Payment.

1. Where a subcontractor, on the delivery to him of a note, agreed in writing to waive his subcontractor's lien upon payment of the note, the execution by him of a further release or waiver was not a condition precedent to the right of recovery on the note, since the agreement itself constituted a waiver of the lien, to become effective upon the payment of the note, and since the payment of the note would of itself extinguish the lien, making the formal execution of a waiver a superfluous formality. *Pietsch v. Sangor,* 301
2. In a subcontractor's action against a landowner, the evidence is *held* insufficient to warrant a finding that the amount received by the owner from the contractor's surety included an item for the amount due from the contractor to the subcontractor. *Ibid.*

MILITARY ESTABLISHMENT. See INSURANCE, 6.

MILWAUKEE CITY CHARTER. See MUNICIPAL CORPORATIONS. PUBLIC UTILITIES, 1, 3–8.

MINORS. See INFANTS. MASTER AND SERVANT, 1. WORKMEN'S COMPENSATION, 11–13, 21.

MISREPRESENTATIONS. See FRAUD.

MISTAKE. See COURTS, 4, 5.

MITIGATION OF DAMAGES. See LIBEL AND SLANDER, 10.

MONTH-TO-MONTH TENANCY. See LANDLORD AND TENANT, 6–8.

MORTGAGES.

See CHATTEL MORTGAGES. DIVORCE, 3. WILLS, 4.

Mortgage in form of deed: Consideration.

1. In an action of ejectment brought by the plaintiff, holder of the legal title to a farm, against the defendant, who counterclaimed asking that the deed upon which plaintiff relied be declared a mortgage and for an accounting, the evidence of an experienced lawyer showing that he advised the plaintiff and her son (under whom the defendant claims) that an absolute deed given to secure a debt was in effect a mortgage; that the plaintiff said she wanted a deed, not a mortgage; and that the son said he would trust his mother, and that a

deed was thereupon made, together with evidence to the effect that the farm conveyed was worth $16,000 and that the plaintiff had loaned her son $6,000 and had made admissions that she held the title of the land as security,—is *held* sufficient to establish that the deed was in fact a mortgage, the plaintiff making no effort to show what was the real consideration for the deed. *Evans v. Evans,* 141

Agreements to assume mortgage: Consideration.

2. Where a mortgagor conveyed mortgaged lands to W., but the deed was not signed by his wife, and later the wife, having nothing but an inchoate right of dower, quitclaimed the lands to C., who gave a warranty deed to H. subject to the mortgage, which H. assumed and agreed to pay, and H. and the mortgagee thereupon executed an agreement extending the mortgage, both the agreement to assume and the agreement to extend were without consideration and void. *Maas v. Hesse,* 74

State treasurer as holder in due course of mortgages on deposit.

3. Under sec. 2024—77*j*, Stats., requiring trust companies to deposit securities with the state treasurer, the latter, as respects equities of third parties, is a holder for value in good faith of a mortgage deposited with him in the regular course of his official business in exchange for other securities of equal value. *Maas v. Hesse,* 74

4. Where the state treasurer accepted, as security in a trust company's deposit of securities, a duly recorded first mortgage, its priority in his hands as a first recorded lien was not lost because, subsequent to the date of the first mortgage, the trust company had accepted a third mortgage (which purported to be a first mortgage) on the same property and sold the notes thereby secured to its clients without revealing the fact of its prior mortgage; the noteholders having taken no steps to have the third mortgage declared prior to the first mortgage or to prevent its transfer, and not procuring or recording assignments of the third mortgage. *Butler v. Bank of Mazeppa,* 94 Wis. 351, distinguished. *Ibid.*

5. The state treasurer is not chargeable with secret equities which may exist against the trust company, although the mortgage note was past due at the date of deposit of the securities. *Ibid.*

MOTIONS. See APPEAL, 16. SUBROGATION, 5.

MOTOR VEHICLES. See AUTOMOBILES.

MUNICIPAL CORPORATIONS.

See DETECTIVES, 2, 3, 5, 6. EMINENT DOMAIN. HIGHWAYS, 1. PUBLIC UTILITIES. STREET RAILWAYS, 3, 4.

Officers: Appointment: Eligibility: Appointee rejected within one year.

1. Sec. 925—38*b*, Stats. (ch. 493, Laws 1907), declaring that appointments to public office by the mayor in all cities shall be subject to confirmation by the common council, and that a

rejected appointee shall be ineligible to appointment to the same office for one year thereafter, applies to the city of Milwaukee, although it has a special charter providing in sec. 14, ch. XX, that no general law contravening its provisions shall be considered as amending or repealing the charter except such purpose be expressly declared, the statute not contravening any of the provisions of the charter. *Superior v. Industrial Comm.* 160 Wis. 541, followed. *State ex rel. Gillen v. Braman,* 596

2. Where on April 20, 1920, the mayor of the city of Milwaukee appointed the plaintiff to the office of commissioner of public works, which appointment was rejected by the common council on May 3, 1920, the action of the mayor was an appointment under sec. 925—38*b*, Stats., although on April 20, 1920, plaintiff was ineligible to office because within one year previous to that date he had been appointed to the same office by the mayor and had not been confirmed by the council. By the appointment of April 20, 1920, and subsequent rejection plaintiff became ineligible for office under an appointment made July 26, 1920, and confirmed August 2, 1920. *Ibid.*

Contracts to light park: City of Milwaukee: Competitive bidding.

3. Sec. 16, ch. V, and sec. 16, ch. VI*a*, of the Milwaukee charter, requiring the city to submit contracts for the purchase of "supplies or material" to competitive bidding, are inapplicable to a contract for electricity to light a city park by equipment to be installed by the electric company, giving the city the option, on expiration of a specified period, to terminate the contract and purchase the plant. *Milwaukee E. R. & L. Co. v. Milwaukee,* 329

Same: By whom made.

4. Sec. 13, ch. V, of the Milwaukee charter, requiring contracts entered into by the commissioner of public works to be countersigned by the comptroller and to be examined and approved by the city attorney; sec. 16, ch. VI*a*, giving the board of park commissioners the same powers and authority as to parks previously possessed by the common council and the board of public works; and sec. 13, ch. III, requiring the comptroller to countersign all contracts made in behalf of the city, did not require the park board's contract for the electricity to light a city park to be countersigned by the comptroller and approved by the city attorney, in view of the legislative history of such charter provisions and of the nature of the comptroller's duties under secs. 12–17, ch. III, and secs. 13–15, 18, 19, ch. V, and the general nature of the duties and authority of the park board, under secs. 16, 18, 18*a*, 20–22, ch. VI*a*. *Ibid.*

Claims against. See TAXATION, 3.

Regulation of use of streets by street railway: Remedies against unlawful use. See STREET RAILWAYS.

5. Though the right to prevent the unlawful exercise of a franchise by a street railway company rests solely with the state, to be asserted in *quo warranto,* a city has authority in its govern-

mental capacity and is charged with the duty to maintain the streets for lawful travel, and as an incident of that duty can have their unlawful use by a street railway company prevented by injunction. In its proprietary capacity as the owner of lots a city can, like any other owner, sue for injunction to restrain the placing of an additional burden on the streets abutting its lots without compensation. *Milwaukee v. Milwaukee E. R. & L. Co.* 400

6. The fact that a city has acquiesced for more than twenty years in the use of its streets by a street railway company does not estop the city from asserting its right to prevent such use. *Ibid.*

7. A city seeking to prevent the use of streets for interurban railway traffic cannot, in its proprietary capacity as owner of lots abutting on the streets, resort to condemnation, in the absence of a franchise for interurban traffic. *Ibid.*

8. The use of city streets by a street railway company without a franchise permitting the particular use is a continuing trespass on the streets, which may be restrained by injunction. *Ibid.*

9. As against the city in its governmental capacity or as against the public, a continuing trespass on city streets by a street railway company using the streets for a purpose not permitted by its franchise cannot ripen into a right. *Ibid.*

10. A city has no authority under the provisions of the general charter law (sub. (31), sec. 925—52, Stats. 1919), empowering it to establish and alter grades of streets, or by sub. (51) of that section, empowering it to regulate the laying down of street-car tracks, to require an interurban railway, which laid its tracks on a private right of way before the city was organized, to move its tracks from the right of way which it still owned to another portion of the street, so as to bring the tracks into the center of the street. *State ex rel. West Allis v. Milwaukee L., H. & T. Co.* 225

Defects in street: Sufficiency: Minor defects.

11. The projection of a pipe one and five-eighths inches high and two and three-quarters inches wide near the edge of a sidewalk in a city highway and out of the main line of travel is not an actionable defect under sec. 1339, Stats., making the city liable to one injured by reason of the insufficiency or want of repair of the highway. *Padden v. Milwaukee,* 284

12. In ascertaining whether a city is liable under said sec. 1339 for injuries caused by the defect complained of, the test is not the negligence of the city, but whether the highway is insufficient within the meaning of the statute. *Ibid.*

MUTUAL INSURANCE COMPANIES. See INSURANCE, 1, 2, 11–15.

MUTUAL MISTAKE. See FRAUDS, STATUTE OF, 1.

MUTUALITY. See LANDLORD AND TENANT, 2.

NEGLECTED CHILDREN. See INFANTS, 2, 3. JURY.

NEGLIGENCE.

See AUTOMOBILES. CARRIERS, 5, 6. DAMAGES, 3. EVIDENCE, 3, 4. EXPLOSIVES. FEDERAL EMPLOYERS' LIABILITY. INTEREST. JUDGES. MASTER AND SERVANT. MUNICIPAL CORPORATIONS, 11, 12. PHYSICIANS. RAILROADS. STREET RAILWAYS, 5–10. SUBROGATION, 1–4. TRIAL, 5–11, 13–16. WORKMEN'S COMPENSATION.

Acts constituting negligence: Customary appliance.

1. One who uses a customary appliance which is in good repair and not obviously dangerous, in a usual and customary manner, is free from negligence. *Klosky v. Payne,* 600

Same: Rough play.

2. Where the evidence showed that three defendants who were more or less intoxicated were engaged in a frolic in a saloon, and one of them pushed another against the third, who was thrown against plaintiff, knocking him down and injuring him, the jury were warranted in finding that all three defendants were negligent. *Kovnesky v. Stodola,* 29
3. The fact that plaintiff, some distance away from the defendants, was standing with his back to the bar and his legs crossed, does not make him guilty of negligence as a matter of law, as the jury had a right under the evidence to find that he was not taking part in the fun and frolic going on between the defendants. *Ibid.*

Same: Invitees: Guest injured at home of host.

4. In cases of invitor and invitee, where the invitor is sought to be made liable for failure to exercise ordinary care to keep and maintain his premises in a safe condition, there must be some mutuality of interest or benefit in order to render the invitor liable. *Greenfield v. Miller,* 184
5. Ordinarily there is no liability on the part of a licensor for injuries sustained by those coming on his premises as mere licensees, unless there is something on the premises in the nature of a trap or the licensor is guilty of active negligence. *Ibid.*
6. The relation of licensor and licensee existed where the owner of a new house invited the plaintiff and her husband to spend a holiday as his guests; and there is no liability on the part of the host by reason of the fact that the plaintiff, while walking through the house, slipped on a small rug covering a highly polished floor. *Ibid.*

Res ipsa loquitur. See CARRIERS, 6.

Proximate cause: Burden of proof.

7. Actionable negligence must be affirmatively shown, and the plaintiff has the burden of showing with reasonable certainty how the accident happened. *Pinter v. Wenzel,* 84
8. Where the proof discloses that a given result may have been caused by two or more causes, one of which was the negli-

gence of the defendant, and a jury can only conjecture as to which is the efficient cause, the plaintiff has not met the burden of proving proximate cause. *Matuschka v. Murphy,* 484

Contributory negligence. See APPEAL, 11. AUTOMOBILES, 2, 3, 5–7, 9, 11. NEGLIGENCE. RAILROADS, 2–4. STREET RAILWAYS, 5–10.

Same: Questions for jury.

9. The question whether plaintiff had any connection with a frolic which produced his injuries is for the jury. *Kovnesky v. Stodola,* 29

Same: Negligence of children.

10. The question whether or not a boy nine and a half years old exercised due care under all the facts and circumstances must be determined in the light of the care which is ordinarily exercised by children of the same age, capacity, discretion, knowledge, and experience under the same or similar circumstances. *Goldberg v. Berkowitz,* 603

11. In determining such question due consideration must be given to the power and influence of childish instincts; for while a child may have the knowledge of an adult respecting dangerous acts he may not have the prudence, discretion, or thoughtfulness to avoid the hazards and risks to which they expose him. *Ibid.*

NEGOTIABLE INSTRUMENTS. See BILLS AND NOTES. WAREHOUSEMEN.

NEWSPAPERS. See LIBEL AND SLANDER, 3–10.

NEW TRIAL. See APPEAL, 4, 12, 16. CRIMINAL LAW, 8. LIBEL AND SLANDER, 7.

NOMINAL DAMAGES. See TRESPASS, 3.

NOTICE.
Of claim. See WORKMEN'S COMPENSATION, 7.
Of defects. See SALES, 5.
Of nonpayment of dues. See INSURANCE, 12.
Of possession. See ADVERSE POSSESSION, 3, 4.
Of sale. See EXECUTORS, 4.
To terminate tenancy. See LANDLORD AND TENANT, 5–8.

OFFER. See BROKERS, 4, 5. FRAUDS, STATUTE OF, 7, 8. VENDOR AND PURCHASER.

OFFER OF JUDGMENT. See TRIAL, 3, 4.

OFFSET. See PAYMENT. TAXATION, 6.

OPINION EVIDENCE. See EVIDENCE. TRIAL, 12.

OPTION. See MUNICIPAL CORPORATIONS, 3.

ORDINANCES. See CARRIERS, 1, 2. PUBLIC UTILITIES.

PARENT AND CHILD. See DEATH. MORTGAGES, 1. WORKMEN'S COMPENSATION, 11–14.

PARTIES. See APPEAL, 2.

PARTITION FENCES. See ANIMALS, 1, 3.

PART PERFORMANCE. See FRAUDS, STATUTE OF, 9.

PATIENT. See PHYSICIANS.

PAYMENT.

See BILLS AND NOTES, 2. MECHANICS' LIENS. PUBLIC UTILITIES, 8. SALES, 11. WILLS, 11.

Application of payment on certain obligation: Election by creditor.

Under a judgment in an action between D. and C. determining a certain amount to be due from D. to C., and a greater amount to be due from C. to D., and providing for the offsetting of one against the other and for judgment for D. against C. for the difference, D. has the right to declare on which of his obligations C.'s offset shall be applied, no other application having been made by the court or by C. *Jacob E. Decker & Sons v. Milwaukee C. S. Co.* 87

PENALTIES. See CHATTEL MORTGAGES. WORKMEN'S COMPENSATION, 15.

PERIODIC TENANCIES. See LANDLORD AND TENANT, 4–8.

PERPETUITIES.

See WILLS, 9.

Gift to definite devisee.

A devise of real property to a bishop or his successor, with power to sell the property and use the proceeds for the founding of a new church, is a gift to a definite devisee and is not a perpetuity. *Giblin v. Giblin,* 632

PERSONAL INJURIES. See APPEAL, 8, 9, 11. ASSAULT. AUTOMOBILES. CARRIERS, 5, 6. DAMAGES, 1–3. EVIDENCE, 3, 4. EXPLOSIVES. FEDERAL EMPLOYERS' LIABILITY. INSURANCE, 8–10. INTEREST. MASTER AND SERVANT. MUNICIPAL CORPORATIONS, 11, 12. NEGLIGENCE. PHYSICIANS. RAILROADS. STREET RAILWAYS, 5–10. SUBROGATION, 1–4. TRIAL, 5–11, 13–16. WORKMEN'S COMPENSATION.

PERSONAL PROPERTY. See BAILMENT. CHATTEL MORTGAGES. EXCHANGE OF PROPERTY. INSURANCE, 4, 5. LOGS AND LOGGING. SALES. TAXATION. WAREHOUSEMEN. WILLS. WORKMEN'S COMPENSATION, 9.

PERSONAL REPRESENTATIVES. See EXECUTORS.

PHYSICIANS AND SURGEONS.

See ASSAULT, 4. DAMAGES, 3. INSURANCE, 8, 9. INTEREST. SUBROGATION, 1.

Malpractice: Proximate cause of spread of infection: Sufficiency of evidence.

Although the evidence is sufficient to sustain a finding that an employee of a dentist failed to exercise proper care and skill, it is *held* that the evidence—showing that the patient had a chronic infection of the lower jaw when he appeared for treatment, the future progress of which it was impossible to foretell, and that the subsequent spreading of the infection could have followed the treatment actually administered or

might have followed treatment in accordance with exact scientific methods—is insufficient to support a finding that the lack of care and skill of the dentist was the proximate cause of plaintiff's injuries. *Matuschka v. Murphy,* 484

PLACE OF TRIAL. See VENUE.

PLEADING.

See FRAUD, 3. LIBEL AND SLANDER, 2.

Demurrer: Facts, not conclusions, admitted. See INSURANCE, 1, 2.

A demurrer to a complaint which alleged that no gain or income resulted to a mutual life insurance company from loans made to its policy-holders did not admit such allegation. A demurrer admits all facts well pleaded, but does not admit erroneous conclusions drawn from such facts by the pleader, though bearing the semblance of statements of fact. *Northwestern Mut. L. Ins. Co. v. State,* 119

In mandamus actions. See MANDAMUS, 1.

In juvenile courts. See INFANTS, 1.

PLEDGE. See FACTORS. WAREHOUSEMEN.

POLICE POWER. See DETECTIVES.

POSSESSION. See ADVERSE POSSESSION. DEEDS, 2–4. IMPROVEMENTS. TAXATION, 4–6. TRESPASS, 2.

POSTOFFICE.

Transmission of mail to and from trains: Failure of railway company to give convenient access to cars.

1. A railroad company did not comply with postal regulations requiring it to place mail cars at points accessible to messengers or contractors for wagon service if the mail car was so situated that the use of a truck was necessary to transport the mail from the train to the postal wagons, a railroad platform making it impossible for wagons to back to the train. *Grossbier v. Chicago, St. P., M. & O. R. Co.* 503
2. A letter from the second assistant postmaster general to the railroad company as to delivery of mail from mail cars to wagons is *held* not to supersede postal regulations. *Ibid.*
3. Where a mail contractor transporting mail between the postoffice and trains carried the mail from the train to his wagons by truck under protest that such service should be performed by the railroad, but did not claim compensation for nearly a year and until he was told by an employee of the postoffice department that such service should be performed by the railroad company, he was entitled to recover from the railroad company, such services not having been performed without expectation of pay on his part. *Ibid.*
4. Where the contractor transported the mail by truck from train to wagon on the refusal of the railroad company so to do, though the railroad company was obligated by postal regula-

tions to perform such service, the contractor may recover from the railroad company on the theory that the latter was liable therefor under a *quasi*-contract. *Ibid.*

PREFERENCES. See CARRIERS, 4.

PREJUDICIAL ERROR. See APPEAL, 7–10.

PRESCRIPTION. See MUNICIPAL CORPORATIONS, 6.

PRESUMPTIONS. See ADVERSE POSSESSION, 1. APPEAL, 9. BILLS AND NOTES, 4. CARRIERS, 5, 6. CUSTOMS, 4. DEEDS, 2–4. JURY, 2. WORKMEN'S COMPENSATION, 11, 18, 20.

PRICE. See SALES.

PRINCIPAL AND AGENT. See BROKERS. FACTORS. INSURANCE, 16. WAREHOUSEMEN.

PRIVATE DETECTIVE AGENCIES. See DETECTIVES.

PRIVILEGE. See LIBEL AND SLANDER, 2, 4–6.

PRIVILEGED COMMUNICATIONS. See ASSAULT, 4, 5.

PROBATE OF WILLS. See WILLS.

PROCEDURE in criminal cases. See CRIMINAL LAW.

PROMISSORY NOTES. See BILLS AND NOTES.

PROMOTERS. See CORPORATIONS, 5, 6.

PROOFS OF LOSS. See INSURANCE, 15.

PROXIES. See CORPORATIONS, 3, 4.

PROXIMATE CAUSE. See AUTOMOBILES, 7. NEGLIGENCE, 7, 8. PHYSICIANS. STREET RAILWAYS, 8. WORKMEN'S COMPENSATION, 6.

PUBLIC BUILDINGS. See LANDLORD AND TENANT, 11, 12.

PUBLIC OFFICERS. See LIBEL AND SLANDER, 4. MUNICIPAL CORPORATIONS.

PUBLIC POLICY. See CARRIERS, 4.

PUBLIC UTILITIES.

See CARRIERS. STREET RAILWAYS.

Indeterminate permit: Effect on existing contracts with municipalities. See MUNICIPAL CORPORATIONS, 4–9.

1. An ordinance of the city of Milwaukee passed in the year 1890, permitting electric companies previously prohibited from consolidating by ordinances purporting to grant franchises to them, to consolidate in consideration that the consolidated company furnish electricity for certain purposes to the city free of charge, is void, the permit to consolidate being no consideration for the agreement to furnish free current, in view of the invalidity of the prior ordinances attempting to prevent the consolidation of the companies, such regulations being beyond the city's police power and the city having no power to stipulate for free service. *Milwaukee E. R. & L. Co. v. Milwaukee,* 329

2. Sec. 1797*m*—89, Stats., has been construed to amend franchises of existing utilities and to supersede them when the utility secures an indeterminate permit under sec. 1797*t*—3; and a

contract by an electric company to furnish free electricity to the city is likewise superseded when the company began to operate under an indeterminate permit. *Oshkosh v. Eastern Wis. E. Co.* 172 Wis. 85, distinguished. *Ibid.*

3. Such contract was not validated by sec. 1797*m*—87, empowering cities to prescribe conditions upon which a public utility may be permitted to occupy the streets not inconsistent with the provisions of the public utility act—a contract to give the city free electricity being inconsistent with such act. *Ibid.*

4. The electric company's contract to furnish the city electricity free of charge, invalid because not made by the city in its proprietary capacity and because not supported by a consideration, was not validated by the enactment of the public utility act (sec. 1797*m*—91, Stats.), providing that the charging of rates provided for in an existing contract executed prior to April 1, 1907, shall not constitute a discrimination. *Superior v. Douglas Co. Tel. Co.* 141 Wis. 363, distinguished. *Ibid.*

5. The acceptance by the electric company of an ordinance requiring it to furnish electricity to the city free of charge did not preclude the company, while operating under an indeterminate permit, from claiming that the ordinance was *ultra vires*, since, having become subject to the restrictions of the indeterminate permit, the company became entitled to its benefits. *Ibid.*

Franchises: Creation: Construction.

6. Neither the railroad commission, whose function is to establish reasonable street-car rates, nor the courts can interfere with the granting of a street railway franchise, which is a legislative act; but whether the company needs a further franchise than it has to carry on its business within the limits of a given city is a judicial question within the jurisdiction of the courts. *Milwaukee v. Milwaukee E. R. & L. Co.* 400

Depreciation as an expense of service: Reasonableness of charge.

7. A charge for depreciation is a necessary and proper element of the cost of each year's service and is in the nature of an expense of operation, and provision should be made therefor out of earnings. *Milwaukee E. R. & L. Co. v. Milwaukee,* 329

Same: Excessive charge as payment on capital.

8. Sec. 3, art. XI, Const., requiring a municipal corporation incurring any indebtedness to provide for the collection of a direct annual tax sufficient to pay interest as it falls due and to pay the principal within twenty years, is inapplicable to a city's contract with an electric company requiring the company to operate and maintain a park electric lighting system, terminable after two years by the city's acquisition of title to the plant, upon payment to the company of the difference between the special investment in the park lighting system and the accumulated depreciation reserve provided for at the date of termination, in the absence of proof that the depreciation

reserve exceeded its legitimate limits and the charge therefor was so excessive as to constitute a payment upon capital. *Milwaukee E. R. & L. Co. v. Milwaukee,* 329

PUNITIVE DAMAGES. See DAMAGES, 1, 2. LIBEL AND SLANDER, 9, 10. TRIAL, 10.

PURCHASER. See VENDOR AND PURCHASER.

QUALIFICATIONS of judges. See JUDGES.

QUANTUM MERUIT. See POSTOFFICE, 3, 4.

QUASI-CONTRACTS. See CONTRACTS, 4. POSTOFFICE, 3, 4.

QUESTIONS FOR JURY. See ACCORD. ASSAULT, 1, 2. AUTOMOBILES, 9. CUSTOMS, 2. INSURANCE, 9. LIBEL AND SLANDER, 7. LOGS AND LOGGING, 2. NEGLIGENCE, 2, 9. SALES, 6, 9. STREET RAILWAYS, 5, 6, 9.

QUO WARRANTO. See MUNICIPAL CORPORATIONS, 5.

RAILROAD COMMISSION. See PUBLIC UTILITIES, 6. STREET RAILWAYS, 3.

RAILROADS.

See HIGHWAYS. SUBROGATION.

Station platforms: Sufficiency: Ordinary construction.

1. A railroad passenger station platform is not obviously unsafe because it was on a level with the rails, or because there was a space of only four feet and eight inches between the overhang of an engine passing on the track and a stairway, where the only evidence on the point was to the effect that the tracks and platform were constructed in the ordinary and usual manner. *Klosky v. Payne,* 600

Injuries to employees. See FEDERAL EMPLOYERS' LIABILITY.

Injuries to licensee in yards: Contributory negligence.

2. Uncontradicted evidence that warning signals were repeatedly sounded by a train running about eight miles an hour while passing through railroad yards and that the trainmen saw plaintiff, who was familiar with the yards, walking along the tracks in a place of safety until the train was almost upon him, when he started to cross the track upon which the train was approaching, is *held* to justify a directed verdict for the defendant railroad company on the issue of negligence, even if it be conceded that plaintiff was a licensee. *Muchlinski v. Chicago, M. & St. P. R. Co.* 442

Injuries to trespassers: Boy playing on standing train: Attractive nuisances.

3. A boy nine years old, traveling with companions on a railroad right of way while gathering flowers, at a place used by pedestrians as a foot-path to the knowledge of the railroad company, is a licensee with the right to travel over the right of way in the manner in which it is used by pedestrians; but when he diverts from his travel and mounts cars of a standing freight train to engage in play he becomes a trespasser, to

whom the company owes no active duty unless its employees have knowledge of his presence and perilous position on the train; and if he is injured when the train is started in the usual manner without such knowledge the company is not liable therefor. *Carmer v. C., St. P., M. & O. R. Co.* 95 Wis. 513, distinguished. *Wendorf v. Director General of Railroads,* 53

4. Where a boy passed onto the right of way of a railroad, climbed onto freight cars, and while playing was injured when the train started, failure of the company to provide cattle-guards, as required by sec. 1810, Stats., was not the proximate cause of his injuries. *Ibid.*

5. A train of railroad cars cannot be classed with turntables or like machinery as alluring and attractive to children so as to require careful guarding against danger to them. *Ibid.*

Transportation of mail. See POSTOFFICE.

RAPE. See CRIMINAL LAW, 7, 12.

REAL-ESTATE BROKERS. See BROKERS.

REAL PROPERTY. See ADVERSE POSSESSION. ANIMALS, 1. BROKERS. DEEDS. EASEMENTS. EXECUTORS, 3–6. IMPROVEMENTS. LANDLORD AND TENANT. MECHANICS' LIENS. MORTGAGES. MUNICIPAL CORPORATIONS, 5–12. PERPETUITIES. PUBLIC UTILITIES. SPECIFIC PERFORMANCE. STREET RAILWAYS. TAXATION. TENANCY IN COMMON. TRESPASS. VENDOR AND PURCHASER.

REFORMATION OF INSTRUMENTS. See FRAUDS, STATUTE OF, 1.

REGULAR ARMY. See INSURANCE, 6.

REHEARING. See APPEAL, 3.

RELETTING LEASED PREMISES. See LANDLORD AND TENANT, 13, 14.

RELIGIOUS CORPORATIONS. See PERPETUITIES. WILLS, 4, 9.

REMANDING CASE. See APPEAL, 16. COURTS, 4.

RENT. See LANDLORD AND TENANT. TENANCY IN COMMON.

RENUNCIATION OF CONTRACT. See SALES, 10, 11.

RESCISSION. See SALES, 10, 11.

RESERVATIONS. See DEEDS, 7, 8.

RES GESTÆ. See EVIDENCE, 3, 4.

RESIDUARY LEGATEES. See EXECUTORS, 4. WILLS, 7, 8, 18.

RES IPSA LOQUITUR. See CARRIERS, 6.

RESPONDEAT SUPERIOR. See MASTER AND SERVANT, 3.

RETRACTION. See LIBEL AND SLANDER, 9, 10.

REVENUE STAMPS. See CORPORATIONS, 3, 4.

REVIEW. See APPEAL.

REVOCATION OF CONTRACT. See LANDLORD AND TENANT, 3.

ROADS AND STREETS. See AUTOMOBILES. CARRIERS, 1–3. EASEMENTS, 2. EMINENT DOMAIN. HIGHWAYS. MUNICIPAL CORPORATIONS, 5–12. STREET RAILWAYS.

RULES OF COURT.

Supreme Court Rules 31, 32, and 33 (Submission of causes), 296, 298–300.

SALES.

See BILLS AND NOTES, 3, 4. CHATTEL MORTGAGES. EXCHANGE OF PROPERTY. FRAUD, 5–8. FRAUDS, STATUTE OF, 4–9.

Validity. See FRAUDS, STATUTE OF.

Construction of contract: Lumber sold f. o. b. cars: Title.

1. Under a contract for the sale of lumber f. o. b. cars at a certain siding, the title to the lumber, which had been brought to the siding for loading but had not been loaded on the cars, remained in the seller. *Schenning v. Devere & Schloegel L. Co.* 20

Same: Placing goods at buyer's risk.

2. Where the seller had written the buyer urging immediate orders for shipment of the lumber because of the danger from fire while it remained piled near the railroad track, and the buyer replied promising to send shipping instructions in a day or two, a finding by the trial court that a delay of ten days in sending the shipping instructions was unreasonable under the circumstances, so as to render the buyer liable for the loss under sub. (2), sec. 1684*t*—22, Stats., placing goods at the risk of the party at fault in delaying delivery, was proper. *Schenning v. Devere & Schloegel L. Co.* 20
3. The fact that the seller failed to make any claim against the buyer for six months after the loss does not defeat his right of action. *Ibid.*

Same: Construction by parties: Single or separate contracts.

4. Where the parties to a contract of sale, effected by two separate orders, treated the matter of the time for shipment of the goods as if covered by a single contract, their construction will be followed and the contract will be treated as single. *Ambler v. Sinaiko*, 168 Wis. 286, followed. *Chess & Wymond Co. v. La Crosse Box Co.* 382

Performance: Acceptance of goods: Waiver of defects.

5. Under sec. 1684*t*—49, Stats., the buyer of kiln-dried rotary-cut gum veneer which accepted the material on delivery without giving the seller notice of defects in quality could not, when sued by the seller for the price, recover on its counterclaim for damages for defects in quality. *Chess & Wymond Co. v. La Crosse Box Co.* 382
6. Where the only issue in an action for the purchase price of annealing pots was whether they were merchantable, it was proper for the jury to consider the conduct of defendant in using them, there being evidence tending to show that pots delivered previously were of the same kind and quality and were used by the defendant. *Stowell Co. v. South Side M. C. Co.* 216
7. Where the only issue submitted by a special verdict involved the inquiry as to whether the pots delivered were in fact merchantable, the court did not err in refusing defendant's request to instruct that, "where goods purchased are necessarily used to maintain a manufacturing plant in operation,

the use of the goods is not a waiver of the right to claim damages if the goods were not merchantable or of the quality contracted for," nothing going to the jury which would lead them to believe that failure to tender back the pots was a waiver of the defendant's right to recover damages, and the instruction given informed the jury that no question of waiver or tender was to be considered. *Ibid.*

8. Where a sale of the pots constituted a sale of a recognized commodity in the market and not a contract for pots to be manufactured pursuant to particular specifications different from those which constituted the marketable commodity, the burden of showing that the articles delivered were not merchantable rested on the buyer, in order to entitle him to a reduction of the claim for the purchase price. *Ibid.*

9. It was not prejudicial error for the court not to tender to defendant, upon whom the burden of proof rested, the opening and closing argument to the jury, where the question was not brought to the trial court's attention and there was nothing in the record showing affirmatively that a different determination of the issues submitted to the jury would probably have been arrived at had the defendant opened and closed the argument. *Ibid.*

Breach: Renunciation by one party.

10. A renunciation by a party of the terms of a contract of sale is a breach of contract which justifies the opposite party in treating the contract as broken and rescinding it at his election. *Chess & Wymond Co. v. La Crosse Box Co.* 382

11. Under sec. 1684*t*—45, Stats., where the buyer of gum veneer not only refused payment, but proposed to hold moneys then in its hands belonging to the seller as security for the further performance of its contract, which constituted a clear departure from the contract and amounted to an announcement that the buyer had declined to carry it out, the seller was justified in its refusal further to perform. *Ibid.*

On chattel mortgage. See CHATTEL MORTGAGES.

SATISFACTION. See ACCORD AND SATISFACTION.

SEALS. See DEEDS, 4.

SECRETARY OF STATE. See DETECTIVES, 2.

SERVANT. See MASTER AND SERVANT.

SERVICES. See CONTRACTS, 1–3. CUSTOMS, 2. EVIDENCE, 1. POST-OFFICE, 3.

SERVITUDES. See STREET RAILWAYS, 3.

SETTLEMENT. See ACCORD. WORKMEN'S COMPENSATION, 7.

SLANDER. See LIBEL AND SLANDER.

SPECIAL ADMINISTRATOR. See COURTS, 2. EXECUTORS, 1.

SPECIAL VERDICT. See TRIAL, 13–17.

SPECIFIC PERFORMANCE.

Conveyance by administrator: Covenants of warranty.

Under sec. 3501, Stats., empowering the court, in an action for the specific performance of a written contract to convey land made by a person since deceased, to require the executor or administrator "to convey the estate" in like manner as decedent ought if living, or in certain circumstances to require the heirs instead of the executor or administrator "to convey the estate," or to join the executor or administrator in the conveyance, or itself by its judgment to pass the title to the land, it is not intended that a deed with usual covenants of warranty be required of an heir. *Van Camp v. Patrick,* 1

SPENDTHRIFTS.

Appointment of guardian: When made.

1. On proceedings for the appointment of a guardian, it is *held* that if the testimony produced before the county court was similar to that given at the trial on appeal to the circuit court, showing that a farmer had been idle and intemperate for more than two years, had paid practically no attention to his property, had not cared for his live stock or paid the taxes on his farm, and had permitted the farm to grow up to weeds, the appointment of a guardian on the ground that he was a spendthrift would have been justified. *Guardianship of Reed,* 628

2. Liberty of the person and the right to the control of one's own property are sacred rights which should not be taken away or withheld except for very urgent reasons. *Ibid.*

Same: Time.

3. On appeal from the judgment of the county court the only question before the circuit court was the competency of an alleged spendthrift to care for and manage his property at the time of the hearing in the circuit court, regardless of his competency or incompetency at the time of the hearing in the county court. *Ibid.*

STAMP TAXES. See CORPORATIONS, 3, 4.

STARE DECISIS. See AUTOMOBILES, 3.

STATE TREASURER. See BANKS. MORTGAGES, 3–5.

STATUTE OF FRAUDS. See FRAUDS, STATUTE OF.

STATUTES.

Constitutionality. See DETECTIVES. MASTER AND SERVANT, 2.

Construction. See BANKS. BILLS AND NOTES, 4. CARRIERS, 4. CHATTEL MORTGAGES. CORPORATIONS, 1, 3, 4. CRIMINAL LAW, 6, 10, 12. DETECTIVES. EXECUTORS, 3. FEDERAL EMPLOYERS' LIABILITY, 1. HUSBAND AND WIFE, 2. JURY, 1. LANDLORD AND TENANT, 11. LIBEL AND SLANDER, 10. MORTGAGES, 3. MUNICIPAL CORPORATIONS, 1, 10–12. PUBLIC UTILITIES, 2–4. SALES, 2, 5, 11. SPECIFIC PERFORMANCE. TAXATION, 2–6. TRIAL, 3, 4. WAREHOUSEMEN. WORKMEN'S COMPENSATION.

STIPULATIONS. See INTEREST.
STOCK AND STOCKHOLDERS. See CORPORATIONS. MANDAMUS, 2.
STRAYS. See ANIMALS.

STREET RAILWAYS.

See CARRIERS, 1–3, 5. DAMAGES, 3. EMINENT DOMAIN. EVIDENCE, 3. HIGHWAYS. MUNICIPAL CORPORATIONS, 5–10. TRIAL, 16, 17.

Street railway service: Interurban service: Abutting owners.

1. Urban surface street car passenger service is the transportation of passengers in suitable cars over the streets of a city operated so as to permit them to enter and leave the cars at reasonable intervals, regardless of the initial point from which the car or passenger comes or the point to which they are destined, the criterion being the character of the service rendered by the cars while on the city streets. *Milwaukee v. Milwaukee E. R. & L. Co.* 400
2. Interurban railway passenger traffic as to a given city is the transportation between it and other cities or municipalities of passengers without thereby rendering reasonable or the prescribed street-car service in such city. *Ibid.*
3. The operation upon an urban surface street railway by the owner of the franchise therefor of cars reasonably suitable for street-car service, and which give street-car service in such manner as the railroad commission may prescribe, or, in the absence of regulations by the commission, give reasonable street-car service, does not subject the adjacent property within the city limits to an additional servitude, though such cars may start from or be destined for points outside the city limits or be used in strictly interurban service outside of the city limits; and the operation of such cars within the city limits does not require any franchise additional to the urban surface street-car franchise. *Younkin v. Milwaukee L., H. & T. Co.* 120 Wis. 477, overruled. *Ibid.*

Franchise: Right to carry freight: Extension of city limits.

4. Where a street railway company had a franchise for carrying freight to a certain street, which was the city limits, it had the right to continue carrying freight to such street after the city limits were extended. *Milwaukee v. Milwaukee E. R. & L. Co.* 400

Injuries at street crossings: Collision with automobile: Contributory negligence: Gross negligence.

5. In an action for personal injuries, the testimony of the driver of an automobile, which was corroborated by that of a passenger riding in the front seat, that he looked and had a full view some 330 feet up a street railway track but did not see a street car which struck the automobile as it was crossing the tracks, is *held* to make the contributory negligence of the driver and of the plaintiff, who was sitting on the back seat with a curtain partly obtructing her view, a jury question. *Moody v. Milwaukee E. R. & L. Co.* 65

6. Where the undisputed facts or the physical situation shows that an approaching car is within plain view of one approaching and about to cross a street railway track, the testimony of one so approaching that he looked but did not see it is not sufficient to take the case to the jury. *Ibid.*

7. Direct and positive testimony that the driver of the automobile performed the duty imposed upon him by law in regard to the exercise of due care is sufficient to take the question of his negligence to the jury, unless such testimony is contrary to physical or conceded facts and is thus impeached because of utter improbability or impossibility. *Ibid.*

8. Where the driver, who had a much better view than plaintiff, looked and saw no car approaching, the failure of the plaintiff to look, if she did fail to look, did not, as a matter of law, proximately contribute to the accident and injury. *Ibid.*

9. Where the driver, while still on the crosswalk, had an unobstructed view for 330 feet and saw no street car approaching, he was not negligent as matter of law in proceeding across the track without making further observations. *Ibid.*

10. Evidence that a street car forty-two feet long and weighing twenty-four tons was operated on a down grade on a busy street at a high rate of speed does not justify the submission to the jury of the issue of gross negligence. *Ibid.*

STREETS. See ROADS AND STREETS. STREET RAILWAYS.

SUBCONTRACTORS. See MECHANICS' LIENS.

SUBROGATION.

Damages enhanced by unskilful treatment of physician: Liability of original tortfeasor: Contribution.

1. A railway company and a physician are not joint tortfeasors because of the fact that the injury to the plaintiff caused by the railway company was enhanced by the negligent treatment of the physician, and the liability of the physician does not arise by reason of his liability for contribution in the event of recovery against the company; but the railway company, on being compelled to pay damages due to the negligence of the physician, is subrogated to the rights the plaintiff had against him. *Fisher v. Milwaukee E. R. & L. Co.* 57

Same: Making physician party defendant. See PHYSICIANS.

2. Under sec. 2610, Stats., providing that when defendant will have a right of action against a third person for the amount of the recovery against him the third person may be made a party defendant, the railway company is entitled to have the physician made a party defendant, notwithstanding the general rule that there can be no right of action by the party subrogated to another's rights until the judgment has been paid. *Fisher v. Milwaukee E. R. & L. Co.* 57

3. Said sec. 2610 applies to tort actions as well as actions on contract, though the trial court, in the exercise of its discretion, should, when called upon, recognize the established distinction between the rights of parties in the two classes of actions. *Ibid.*

4. Under said sec. 2610 the circuit court, in its discretion, may make the physician a party to an action for the injury, though the original defendant would have a right of action against the physician for only a part of the recovery. *Ibid.*

5. Although a case is within the provisions of said sec. 2610, the circuit court may, in the exercise of its discretion, refuse to implead a third person who is liable to defendant; but in this case, the court having exercised its discretion and ordered the physician to be made a party defendant, it could not review such order on demurrer or motion to dismiss a cross-complaint against the physician. *Ibid.*

SUPREME COURT. See APPEAL.

SURETY. See MECHANICS' LIENS, 2.

SURGEONS. See PHYSICIANS AND SURGEONS.

SURVIVAL OF ACTIONS. See ASSIGNMENTS.

TAXATION.

See INSURANCE, 1, 2. PLEADING. TENANCY IN COMMON.

Control over assessing bodies by court: Allocation of income tax.

1. Courts, either at law or in equity, are powerless to give relief against the erroneous judgment of assessing bodies, except as they may be specially empowered by law to do so. *Mineral Point v. Mineral Point,* 355

2. Sec. 1087*m*—17, Stats. 1917, does not contemplate a judicial review of the action of the state tax commission in allocating income taxes of a corporation to the various municipalities entitled thereto under sec. 1087*m*—22; and the statutes of this state confer upon the courts no power or authority to review such allocation. *Ibid.*

3. Under sub. (6), sec. 1087*m*—22, Stats. 1917, where the plaintiff town applied to the tax commission and had the income tax of a corporation paid the defendant city allocated to it, the town securing the written approval of the commission for payment to it by the city of $6,248.58, and the claim of the town was filed with the city within a year, stating the facts, including the fact that the payment had been approved by the tax commission as required by the statute, the town, on refusal of the city to pay, had a good cause of action for the recovery of the amount, less the amounts paid the county and the state; the word "may," in the clause of the statute "such moneys may be paid to such town, city or village as is by law entitled to such tax upon such town, city or village making a satisfactory showing to the common council, town or village board, of such fact, within one year after the payment of the income tax," meaning *must,* and the words "satisfactory showing" not being used in the sense in which they are ordinarily used in contracts. The town, however, has no right to a reallocation by the court or a review of alleged error of the tax commission or taxing officers. *Ibid.*

Tax titles: Action by grantee: Nature of possession required. See ADVERSE POSSESSION.

4. Sec. 1187, Stats., barring an action by the grantee in a tax deed unless he shall be in actual, not constructive, possession of the land for three successive years within the next five years after the recording of the tax deed, operates in favor of the possessor to bar the title of whichever party, the original owner or the tax-title claimant, was, during the three years next after the recording of the tax deed, out of actual possession and thus compelled to resort to legal proceedings to obtain possession. *Perkins v. Perkins,* 421

5. Under sec. 1187, requiring the possession of the tax-title claimant to be actual, not constructive, and sec. 1190, providing that possession, within the meaning of sec. 1187, is governed by the rules prescribed for determining adverse possession by one claiming title founded on a written instrument, the possession of a tax-title claimant which was permissive and in subordination to the title of the former owners was the possession of the former owners and operated to bar the tax title. *Ibid.*

Same: Recovery for improvements.

6. A tax deed being fair on its face, the tax proceeding regular, and the defendant having been defeated by virtue of sec. 1187, Stats., the provisions of sec. 3087 do not apply, and the defendant is not entitled to offset taxes on the premises paid by him. *Perkins v. Perkins,* 421

TENANCY AT WILL. See LANDLORD AND TENANT, 4, 5.

TENANCY IN COMMON.

See ADVERSE POSSESSION, 5.

Adverse possession by one cotenant against others.

Where one of several heirs of the record owner of land claimed the equitable interest therein because she had furnished the money to pay therefor, and after the owner's death took possession of the property, paid the taxes, and collected the rents without accounting to the other heirs, all but one of whom deeded their interests to her, the interest of that heir, if any, was barred by the lapse of more than fifty years since possession of the property was so taken and held. *Giblin v. Giblin,* 632

TENANT. See LANDLORD AND TENANT.

TENDER. See SALES, 7.

TERMINATION.

Of contract. See MUNICIPAL CORPORATIONS, 3.

Of lease. See LANDLORD AND TENANT, 13, 14.

TESTAMENT. See WILLS.

TESTAMENTARY CAPACITY. See WILLS, 1, 2.

TIMBER. See FRAUDS, STATUTE OF, 4.

TITLE.
To land. See ADVERSE POSSESSION. ANIMALS, 1. DEEDS. DESCENT. EASEMENTS. EMINENT DOMAIN. ESTOPPEL. EXECUTORS, 3–6. FRAUD, 1–4. FRAUDS, STATUTE OF. MECHANICS' LIENS. MORTGAGES. SPECIFIC PERFORMANCE. TAXATION, 4–6. TENANCY IN COMMON. VENDOR AND PURCHASER. WILLS.
To personal property. See BAILMENT. CHATTEL MORTGAGES. DESCENT. EXCHANGE OF PROPERTY. EXECUTORS. FACTORS. FRAUD, 5–8. FRAUDS, STATUTE OF, 4–8. SALES. TRESPASS. TRIAL, 1. WAREHOUSEMEN. WILLS. WORKMEN'S COMPENSATION, 8, 9.

TIME. See LANDLORD AND TENANT, 4–8.

TORTS. See ANIMALS. ASSAULT. ASSIGNMENTS. AUTOMOBILES. CORPORATIONS, 6. FEDERAL EMPLOYERS' LIABILITY. FRAUD. LANDLORD AND TENANT, 11, 12. LIBEL AND SLANDER. NEGLIGENCE. PHYSICIANS. RAILROADS. STREET RAILWAYS, 5–9. SUBROGATION, 1, 3, 4. TRESPASS. TRIAL, 1, 5–11, 13–16. WORKMEN'S COMPENSATION.

TOWNS. See TAXATION, 3. WORKMEN'S COMPENSATION, 7.

TRANSPORTATION OF MAIL. See POSTOFFICE.

TREBLE DAMAGES. See WORKMEN'S COMPENSATION, 21.

TRESPASS.

See ANIMALS. MUNICIPAL CORPORATIONS, 8, 9. RAILROADS, 3, 4. TRIAL, 1.

Logs floating on land of another: Recovery of damages.

1. Evidence tending to prove that defendant paid damages suffered by plaintiffs during the year 1905 on account of logs floating upon their land was properly excluded in an action for a similar trespass in subsequent years, payment of damages for such year not being evidence that plaintiffs had sustained damages in the following years. *Polebitzke v. John Week Lumber Co.* 509
2. Where the property of one person has been carried on the land of another by flood he has the right to recover its possession and for that purpose to go on the land where it lies and remove it, and is not liable for damages. *Ibid.*
3. Nominal damages are awarded where a person has sustained an invasion of his rights; but where the defendant had a right to remove its property lodged on plaintiffs' lands, they are not entitled to other than actual damages. *Ibid.*

TRIAL.

See CONTRACTS, 1–3. DAMAGES. INTEREST. INTERPLEADER. SALES, 6.

Place of trial. See VENUE.

Qualifications of judge. See JUDGES.

Right to jury trial. See JURY.

Bringing in new parties. See APPEAL, 2. SUBROGATION, 2–5.

View of premises by jury: Discretion of court.

1. In an action of trespass involving the carrying of defendant's logs on plaintiffs' land by flood and their subsequent removal by defendant, though the incidents out of which plaintiffs claimed their cause of action arose had occurred long before the time of trial, it is *held* that under the circumstances the question of whether or not the jury should view the premises was a matter resting in the sound discretion of the trial court. *Polebitzke v. John Week Lumber Co.* 509

Offer of judgment: How made: Admitted liability in answer.

2. Where defendants in an action by architects to recover for services rendered admitted liability in the amount of $200, the plaintiffs basing their action on an express contract for $1,750, and the court rendered judgment for $600 for plaintiffs, for which there was no basis in the evidence, on appeal defendants were bound by their admission of liability for $200 and plaintiffs were entitled to judgment for that sum, even though they insisted on appeal that there was an express contract for the larger amount. *Tullgren v. Karger,* 288
3. Although defendants in their answer offer "to allow judgment to be taken against them in this action for the sum of $200 with costs," such offer cannot be considered as an offer of judgment under sec. 2789, Stats., or as having any effect upon plaintiffs' right to costs in the trial court, as the offer of judgment under such statute must be embodied in some other document than the answer itself. *Ibid.*
4. If an offer of judgment under said sec. 2789 is not accepted within the ten-day period fixed by that section it must be withdrawn from all consideration of the court and cannot be used in evidence in any way, nor can it be subsequently accepted after the period limited; but when an offer of judgment is embodied in an answer it becomes a part of the pleading, is properly before the court, and may be offered in evidence and considered by the jury during the trial. *Ibid.*

Examination of witnesses. See APPEAL, 10, 13.

Examination of experts. See EVIDENCE, 1. WILLS, 2.

Undisputed testimony: When controlling. See STREET RAILWAYS, 7.

5. The rule that the undisputed reasonable evidence of one witness, though a party to the action, should have controlling weight in determining a question of fact, does not apply to the testimony of defendant as to the accident in which plaintiff's decedent was killed, where many facts and circumstances did not accord with defendant's testimony, though no witness denied his statements. *Feyrer v. Durbrow,* 172 Wis. 71, distinguished. *First Wisconsin Trust Co. v. Schmidt,* 477

Degree of proof. See DEEDS, 2. EVIDENCE, 2. EXECUTORS, 2.

Order of argument. See SALES, 9.

Remarks of counsel: Prejudicial error. See APPEAL, 8, 9.

6. Remarks of plaintiff's counsel in summing up a case to the jury to the effect that all the witnesses for the defense were communicants of the Catholic church, blindly subservient to

their priest, against whose instructions they would not think of testifying, are prejudicial, and were not cured by the mere suggestion of the court to disregard them. *Ogodziski v. Gara,* 371

7. A statement in the argument of counsel that witnesses have been persuaded to come in and perjure themselves, there being nothing to warrant such implication, is improper. *Kausch v. Chicago & M. E. R. Co.* 220

8. In a consolidated action by husband and wife against a taxicab company for damages for a collision with their automobile, where a witness who had made a report on the accident, having stated that he was indirectly an employee of the defendant company, in response to further questions testified that he was an employee of an automobile liability company, it was improper for counsel for plaintiffs to persist in their attempts to show that the defendant was insured. *Smith v. Yellow Cab Co.* 33

Instructions to jury. See ANIMALS, 4. APPEAL, 7. ASSAULT, 3, 5, 7. BAILMENT, 2. CRIMINAL LAW, 14. EXCHANGE OF PROPERTY, 2, 3. SALES, 7.

Instructions as to damages in assault and battery action. See ASSAULT.

9. In a woman's action for assault and battery committed by the pastor of the church in which plaintiff's husband was organist, an instruction that plaintiff was entitled to recover such damages as would compensate her for physical pain and mental suffering endured in the past and which "she *may* have to endure in the future" was erroneous, and should have been "which she is *reasonably certain* to endure in the future." *Ogodziski v. Gara,* 380

10. The expression in the charge, "You must be satisfied to a reasonable *extent,*" should have been, "You must be satisfied to a reasonable *certainty.*" The charge "She is *entitled* to damages for the indignity," referring to punitory damages, should have been, "You *may* assess damages for the indignity," etc.; and the expression, "The amount of such damages [punitory] is *governed* by the wealth of the party," should have been, "The wealth of the party is an element to be considered in assessing punitory damages." *Ibid.*

11. The refusal of requested instructions, which were fully and fairly covered by those given is not reversible error. *Groeschner v. John Gund Brewing Co.* 366

Verdicts: Deliberation of court or jury: Matters not of common knowledge.

12. Neither jurors nor trial courts in arriving at their conclusions of fact can properly act upon their special individual knowledge as to matters which are not of common knowledge; and in matters outside of the field of general knowledge and in cases where the testimony of experts and those particularly familiar with the matters at issue is necessary, the findings of all triers of fact, either court or jury, must be based upon

testimony of witnesses or other evidence made a part of the record. The only exception to the rule is in cases where a trial court exercises his independent judgment as to the value of attorneys' services rendered in a case before him. *Tullgren v. Karger,* 288

Same: Special verdict: Purpose. See APPEAL, 11, 16.

13. The function of a special verdict is to secure a finding on each litigated question. In negligence cases each ground of negligence constitutes a distinct question, and proper practice requires the special verdict to be so framed as to indicate in what respect the jury agree in finding negligence. *Matuschka v. Murphy,* 484

Same: Form of verdict. See ASSAULT, 7.

Same: Changing answers in verdict: Burden of proof.

14. Where it was admitted that plaintiff promised to marry defendant, and the jury found that he had breached the agreement and awarded $1,500 damages to the defendant, and also found that a note of $3,500 given by plaintiff to defendant was not given under duress, their finding that the note was without consideration was simply a finding of a conclusion of law, which was for the court, and should have been changed or disregarded. *Westenberg v. Bhend,* 137

15. An answer in the special verdict that the note was without consideration should be disregarded, if inconsistent with other answers, where the great weight of the evidence showed that the consideration for the note was a release of liability for a breach of the marriage promise. *Ibid.*

16. Where a complaint alleged that defendant's street car was standing still when plaintiff attempted to board it and that it was negligently started up suddenly, throwing him against a parked automobile and injuring him, it was error to give an instruction placing on defendant the affirmative of the issue presented by the question to the jury, Was the car in motion when plaintiff attempted to board it? *Kausch v. Chicago & M. E. R. Co.* 220

17. Questions submitted to the jury should be so framed as to put the burden of proof on the affirmative; and the placing upon the wrong party of the burden of proof as to a material issue is prejudicial error, where the jury's finding is against such party. *Ibid.*

Directed verdict. See RAILROADS, 2.

Entry of judgment against separate tortfeasors.

18. The entry of a judgment in one or more actions of tort against separate tortfeasors, who have at different times deprived the true owner of the possession of his property, does not operate to divest the owner of his title. It is only when one of the judgments is satisfied and the owner has received compensation that a tortfeasor can assert title to the property. *Jacob E. Decker & Sons v. Milwaukee C. S. Co.* 87

Trials in criminal cases. See CRIMINAL LAW.

New trial. See APPEAL, 5.

TROVER. See TRIAL, 18.
TRUST COMPANIES. See MORTGAGES, 3–5.
TRUST COMPANY BANKS. See BANKS.
TRUSTS. See EXECUTORS, 4–6. WILLS, 6, 7, 9, 14.
TURNTABLES. See RAILROADS, 5.
ULTRA VIRES. See PUBLIC UTILITIES, 5.
UNDUE INFLUENCE. See DEEDS, 1. WILLS, 1.
UNIVERSITIES. See WILLS, 9.
URBAN SURFACE LINES. See STREET RAILWAYS.
USAGES. See CUSTOMS AND USAGES.
UTILITIES. See PUBLIC UTILITIES.

VENDOR AND PURCHASER.

See DEEDS. EXECUTORS, 3–6. FRAUD, 1–4. FRAUDS, STATUTE OF, 1–4. SPECIFIC PERFORMANCE.

Contract of sale: Acceptance on condition.

1. A landowner's acceptance of an offer specifying that the purchaser should satisfy the tenant, with whom he claimed to have only a tentative agreement, did not create a binding contract, the stipulation as to satisfying the tenant constituting a material condition. *Helmholz v. Greene,* 306

Same: Noncommunicated acceptance: Withdrawal of offer.

2. The mere signing an acceptance of a written offer to buy land without communicating the acceptance to the vendor does not create a contract within the meaning of the statute of frauds. *Helmholz v. Greene,* 306
3. A written offer to purchase land specifying that the proposition is subject to acceptance before a specified date, if not based on a consideration may be withdrawn at any time before acceptance. *Ibid.*

Same: Return of amount paid.

4. Where the written offer to purchase specified that in the event of non-acceptance of the offer the amount paid was to be returned, the purchaser was entitled to such amount where there was no valid acceptance of the offer. *Helmholz v. Greene,* 306

VENUE.

See INFANTS, 1. JUDGES.

Change of venue: Nature of right: When application to be made.

The right to a change of venue is purely statutory and can be insisted upon only where the conditions prescribed by the statute authorizing the change exist; and the refusal of an application for a change of venue because of the prejudice of the trial judge, not made on or before the first day of the term as required by sec. 2625, Stats., is not erroneous even

though the facts upon which the application was based were not known until after the commencement of the term. *Groeschner v. John Gund Brewing Co.* 366

VIEW. See TRIAL, 1.

WAIVER.
Of claim. See CORPORATIONS, 7. SALES, 7. WORKMEN'S COMPENSATION, 7.
Of compensation. See WORKMEN'S COMPENSATION, 8.
Of contract. See BROKERS, 6.
Of defects. See FRAUD, 8.
Of eviction. See LANDLORD AND TENANT, 10.
Of exception. See INTERPLEADER, 2.
Of jeopardy. See CRIMINAL LAW, 5, 8–10.
Of lien. See MECHANICS' LIENS, 1.

WAREHOUSEMEN.

Warehouse receipts: Negotiability: Who may claim.

Sec. 1675—1, Stats. 1915, in effect declaring a warehouse receipt, when not marked "not negotiable," to be negotiable like an inland bill of exchange, according to the law merchant, can aid only a third person into whose hands the receipt comes, and cannot aid a warehouseman to whom the receipt is pledged by the person to whom it was issued—a factor who had stored his principal's goods. *Jacob E. Decker & Sons v. Milwaukee C. S. Co.* 87

WATERS. See DEEDS, 7. TRESPASS, 1, 2.

WIDOW. See WORKMEN'S COMPENSATION, 8.

WIFE. See HUSBAND AND WIFE.

WILFUL TRESPASS. See ANIMALS, 3, 4.

WILLS.

See APPEAL, 13. COURTS. EXECUTORS.

Testamentary capacity: Undue influence.

1. The evidence in this case, while conflicting, is *held* to support the conclusion of the court that there was testamentary capacity and that the will was not the result of undue influence. *Estate of Goodyear,* 363
2. A hypothetical question propounded by the contestants of a will to their expert having been answered in their favor, the refusal of their motion to have certain testimony included as a part of the question was harmless. *Ibid.*

Construction: Designation of devisee.

3. In construing a will the constant effort of courts is to ascertain and give effect to the intention of the testator. *Will of Dever,* 208
4. A devise to "St. Paul's Roman Catholic *Church* of Beloit" of the "mortgage which I now hold against the said church" sufficiently designates the devisee, although there was no corporation of that name in the city, where the testatrix was

the owner of a mortgage executed by St. Paul's Roman Catholic *Congregation* of Beloit, which was the only St. Paul's Roman Catholic congregation in that city. *Giblin v. Giblin,* 632

5. A will giving "one third" of the residue of testator's estate to each of two daughters and "one twelfth" each to a daughter-in-law and seven named grandchildren, is construed to give one third to each of the two daughters and one twenty-fourth to the daughter-in-law and each of the grandchildren, it being the apparent intention of testatrix to divide the other third among the daughter-in-law and the grandchildren. *Estate of Boyce,* 575

Same: Devise "in trust."

6. Where testator, after making certain devises in his will, gave the residue of his estate to certain named persons *in trust,* and said no more, an ambiguity as to whether he intended a trust in the true legal sense arises, and to resolve such ambiguity the court may consider the extent of the estate, testator's family relations, his attitude towards his next of kin, and his relations with those claimed to be his beneficiaries under that clause of the will where the expression "in trust" occurs. *Will of Dever,* 208

7. Under the circumstances—testator being an uneducated man, having as his only relatives an aged aunt in a distant state and two cousins, with none of whom he had been particularly intimate and for whom he had made generous provision in the will, and the persons named as residuary legatees being his daily associates, who had extended to him their friendship and the hospitality of their homes, and the fact that the testator in drawing his will had before him the will of his deceased brother which he used as a form and which contained trust features none of which testator followed,—a clause leaving the residue of his estate "in trust" to his executors, with direction that they be not required to furnish bond and might use their best judgment, is *held* not to have created any trust; the phrase "in trust" having been used in its popular sense, expressive of the confidence which testator reposed in his executors. *Ibid.*

8. Under a clause in testator's will whereby he directed that the balance of his estate be distributed in equal shares "to the then living children or lineal descendants by right of representation of my six brothers," naming them, it was testator's intention to distribute his residuary estate per capita among the then living children of the named brothers, the lineal descendants of any deceased child to take the parent's share by right of representation. *Will of Dalrymple,* 464

Same: Conditional devise: Perpetual trusts. See PERPETUITIES.

9. A devise of real estate to a university on condition that it care for the tomb of testatrix for all time is merely a conditional devise and not a perpetual trust, and is valid regardless of whether the university has authority to accept a perpetual

trust. *State Historical Society v. Foster,* 172 Wis. 155, followed. *Giblin v. Giblin,* 632

Vesting of estate: Gifts in præsenti.

10. Where testator, after providing for the payment of specific legacies, debts, and expenses, gave and bequeathed one sixth of the residue of his estate to his grandson, to be paid him with accumulated interest when he should reach the age of thirty, there was a gift *in præsenti,* absolute in form, and the interest of the legatee vested upon the death of testator, unless a contrary intent could clearly be gathered from the will. *Will of O'Brien,* 41

11. The law favors an early vesting of title to an interest bequeathed by will; and unless the element of time is made a contingency on which the legatee takes, a mere postponement of time does not prevent his interest from vesting where there is a present absolute gift made by the will, the element of time being annexed to the time of payment and not to the substance of the gift. *Ibid.*

12. Where the will provided that in case a son who was a legatee should die leaving children his share should go to them, and that in case any of the children of a deceased son, who were also legatees, should die, their shares would go to their brothers and sisters, the death referred to in each case was one occurring during the lifetime of the testator. *Ibid.*

Same: Distribution at discretion of executors.

13. Where a will provided for distribution of testator's estate at the expiration of ten years after his decease, or at such time or times after said ten years, but prior to the expiration of twenty years, from his decease as his executors and trustees or their successors should deem expedient or advisable, the testator gave to the executors and trustees a discretion as to the distribution of his estate within the period limited, with the right to make partial distribution thereof as circumstances might warrant. *Will of Dalrymple,* 464

14. The will having invested testator's executors and trustees with discretion as to the time when they should distribute the estate, the remainder of the estate will vest at the expiration of the twenty-year period wherein distribution is discretionary with the executors, or at such prior time or times as the executors and trustees may, in their discretion, fix for its distribution. *Ibid.*

Interest on legacies: When payable: Accumulations.

15. General legacies do not bear interest until one year after the death of testator unless the will shows a contrary intent; but legacies in payment of debts or for the support of infants, widows, or dependents are exceptions to the general rule. *Will of Barrett,* 313

16. Where the will of testatrix provided for the conversion of real estate into cash within such time as it could be conveniently and advantageously done, without limiting the executors to a fixed period of time within which to make the conversion,

and provided for the payment of legacies out of the proceeds of the sale of the real estate, the legacies were not due until the property had been converted, the rule that a general legacy becomes payable one year after the death of the testatrix and bears interest from that time not being applicable. *Estate of Boyce,* 575

17. A will bequeathing property in trust which directed the executor to pay the trustee the bequest in money and also directed the trustee to invest the funds and pay the interest to life tenants manifested testator's intention that the life tenants receive interest from the time the legacies were payable to the trustee, which is one year after testator's death. *Will of Barrett,* 313

18. A fund distributed to testator's beneficiaries being part of his residuary estate, and the right thereto in the beneficiaries having vested with the filing of the petition for distribution by the executors, the beneficiaries or legatees are entitled to the accumulations of the fund in the interim. *Will of Dalrymple,* 464

WITNESSES. See ASSAULT, 4. TRIAL.

WORDS AND PHRASES.

Accept, in federal statute. See page 421.
Any other automobile, vehicle, or object, in insurance policy. See INSURANCE, 4.
As directed by owner. See LOGS AND LOGGING, 1.
By, in notice to quit. See LANDLORD AND TENANT, 8.
By right of representation, in will. See page 471.
Claim, in statute. See WORKMEN'S COMPENSATION, 7.
Collision, in insurance policy. See INSURANCE, 4.
Convey the estate, in statute. See SPECIFIC PERFORMANCE.
Dependent child, in statute. See JURY, 1.
Employee, in statute. See WORKMEN'S COMPENSATION, 4.
Fact. See WORKMEN'S COMPENSATION, 4.
In equal shares, in will. See page 469.
Interest in land, in statute. See FRAUDS, STATUTE OF, 4.
Interurban railway passenger traffic. See STREET RAILWAYS, 2.
In trust, in will. See WILLS, 7.
Law. See page 406.
Lineal descendants. See page 471.
May, in statute. See TAXATION, 3.
Neglected child, in statute. See JURY, 1.
Object, in insurance policy. See INSURANCE, 4.
One month's notice, in statute. See LANDLORD AND TENANT, 4.
Opposing party, in Rules of Supreme Court. See page 300.
Public building, in statute. See page 245.
Quasi-contract. See CONTRACTS, 4.
Regular army, in insurance policy. See INSURANCE, 6.
Report of judicial proceeding. See page 10.
Satisfactory showing, in statute. See TAXATION, 3.
Supplies or material, in city charter. See MUNICIPAL CORPORATIONS, 3.
Support, in statute. See WORKMEN'S COMPENSATION, 12.
Tenancy at will, in statute. See LANDLORD AND TENANT, 4.

Urban surface street car passenger service. See STREET RAILWAYS, 1.
Value, in statute. See page 542.
Vehicle, in insurance policy. See INSURANCE, 4.
Void, in statute. See EXECUTORS, 3.

WORKMEN'S COMPENSATION.

See INSURANCE, 10. MASTER AND SERVANT, 2.

Construction of act.

1. Sec. 2394—25, Stats. 1917 (the workmen's compensation act), should be liberally construed to afford workmen a remedy for meritorious claims. *Stephenson v. Schelk,* 251

Jurisdiction of industrial commission.

2. The rights established by the compensation act cannot be enlarged, restricted, or modified in respect to claims and liabilities within their scope. *Porter v. Industrial Comm.* 267
3. The jurisdiction of the industrial commission is limited by the compensation act (sec. 2394—15) to the determination of disputes concerning compensation, and, on finding that a claimant was not an employee of the insured employer, the commission has no jurisdiction to adjudicate questions between the employer and the insurer as to their contract rights. *Ibid.*

Who are employees.

4. A finding by the industrial commission that plaintiff was not an "employee" within the contemplation of the workmen's compensation act (sec. 2394—7, Stats.) is a finding of fact and cannot be disturbed by the court where the evidentiary facts, though not conflicting, permitted different inferences, the term "fact" including the inferences or inferential facts drawn by the trier from ascertained facts. *Porter v. Industrial Comm.* 267
5. In actions by an applicant under the compensation act and by the insured employer against the insurer to review the order of the industrial commission denying compensation, based on a finding that claimant was not an employee, allegations that the insurer led plaintiffs to believe that the contract of insurance recognized claimant as an employee, and that the employer in good faith acted on such representation and accepted the policy on the ground that it included the claimant as an employee, do not show a right to relief on the ground that the award was obtained by fraud. *Ibid.*

Injury: Predisposition to disease.

6. Predisposition to disease does not prevent an award under the workmen's compensation act when the disability is proximately caused by accident. *Hackley-Phelps-Bonnell Co. v. Cooley,* 128

Claims against third persons: Effect.

7. Where an employee of a town was injured while working on one of its roads by being shot by one or the other of two

campers firing at a target, mere negotiations with the campers as to what he would accept in settlement, unaccompanied by a demand or a notice that if they did not pay he would take further steps against them, do not constitute a "claim" against a third person for damages within the meaning of sub. 2, sec. 2394—25, Stats. 1917, operating as a waiver of any claim for compensation against the employing town; the word "claim" meaning a demand of some matter as of right, made by one person upon another to do or forbear to do some act or thing as a matter of duty. *Stephenson v. Schelk,* 251

8. The act of the administratrix of the estate of a deceased employee in bringing a common-law action against the superintendent of the employing company, who was driving an automobile in which the employee was riding at the time of the accident, to recover damages for his death under secs. 13702 and 13703, Howell's Michigan Statutes, is *held* not to have waived the right of the widow of the deceased to claim compensation from the employer under the Wisconsin workmen's compensation act. *Miller Scrap Iron Co. v. Boncher,* 257

9. The administratrix being charged with the duty of collecting the assets of the estate and subject to no direction except by the court which appointed her, requests, suggestions, or advice by the widow in reference to the prosecution of the common-law action are immaterial, as the administratrix had absolute control over it. *Ibid.*

10. Where the facts pleaded before the industrial commission by the employer and insurer as a defense to the widow's application for compensation for the death of her husband constituted no defense, the commission was not required to make findings with reference thereto, and its failure so to do is therefore immaterial. *Ibid.*

Dependency: Parents and children.

11. There is no presumption from the mere fact of family relationship that parents are partially dependent on an unmarried son nineteen years old within the meaning of the workmen's compensation act, and they have the burden of showing such dependency to a reasonable certainty by competent evidence. *Milwaukee Basket Co. v. Wiecki,* 391

12. Where members of a family consisting of the parents and six children contributed amounts aggregating $3,022 to the family earnings, of which deceased, an unmarried son nineteen years old, contributed $824, being $432 in excess of the amount used for his support, the industrial commission was warranted in finding that such son contributed the latter amount to his parents' "support" so as to entitle them to benefits allowable to partial dependents under sub. (4) (c), sec. 2394—9, Stats., based on his contribution, though $900 of the family earnings were paid on the purchase of a home. *Ibid.*

13. Where a minor contributes his earnings to the family funds, so much thereof as is actually needed and necessarily used for his individual care and support from the general family purse should be deducted from his earnings in determining

the amount of his contributions to the support of his dependents, under sub. (4) (c), sec. 2394—9, Stats., notwithstanding the parents' legal duty to support him. *Ibid.*

14. Where an adult son living with his parents paid them his board and lodging and contributed nothing else to the family purse excepting presents, made payments amounting to $400 upon a home for the family, as he had agreed to do if his father would purchase one, and paid $45 for furniture to be used in the home, his parents are not entitled, under the workmen's compensation act—sub. (4) (c), sec. 2394—9, Stats.,—to an award for his death. *Wisconsin-Minnesota L. & P. Co. v. Johnson,* 398

Penalties: Failure to comply with safety order: Increased compensation.

15. Where part of the machinery of a sand and gravel crane consisted of a long belt carrier driven by a pulley thirty-six inches in diameter and reached by a platform, such pulley was "exposed to contact" within the meaning of Order No. 2 of the industrial commission requiring all pulleys over eighteen inches in diameter which are exposed to contact to be guarded; and hence a workman caught in the unguarded pulley while applying dressing was properly awarded increased compensation by way of penalty because his injury resulted from the failure to comply with the orders of the commission. *Eau Claire Sand & Gravel Co. v. Cleveland,* 561

Review: Findings of commission: Weight: Presumptions.

16. In proceedings under the workmen's compensation act an employee's account of his injury, to the effect that he had slipped on some ice and struck his arm against a stump and that slivers had penetrated the arm, was not so improbable as to be unworthy of belief, and the commission was justified in finding in favor of the employee. *Hackley-Phelps-Bonnell Co. v. Cooley,* 128

17. On appeal from an order affirming an award under the compensation act, the supreme court will not substitute its opinion on a question of fact from a reading of the record for that of the industrial commission. *Ibid.*

18. In an action to review and set aside an award of the industrial commission, the presumption of regularity of official acts applies and the award will be presumed to have been regularly made. *Ibid.*

19. Findings of fact and an award under the compensation act, reciting that the findings and award are made by the industrial commission, are sufficient. It is not necessary to recite the details of the commission's procedure whereby it finds the facts and makes the award, nor to recite more explicitly than that the commission acts—that it has complied with the law as to the manner of meeting for making its decisions. *Ibid.*

20. Because presumption as to the regularity of official acts rules this case, it is not necessary to decide whether one appealing

from an award of the industrial commission could have offered proof that the commission had not acquired jurisdiction, or had lost it by not making the award as a body, or whether a direct attack in another form of action would be a proper remedy. *Ibid.*

Same: False representations as to age of minor.

21. An award of treble damages to an injured minor under the workmen's compensation act should not be set aside because of false representations of the minor as to his age. *Stetz v. F. Mayer Boot & Shoe Co.* 163 Wis. 151, followed. *Mueller & Son Co. v. Gothard,* 135

WRIT OF ERROR. See CRIMINAL LAW, 6, 8, 10.

Ex. J. M.
12/28/21